Toronto 1966

Mar. 29, 30

Ottawa May 17

BETWEEN:

SOUTHAM BUSINESS PUBLICATIONS LTD. .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Income Tax Act, R.S.C., 1952, c. 148, ss. 11(1)(a), 12(1)(a)(b) —Purchase of weekly newspaper as going concern—Whether amount attributed to subscription lists and circulation records a deductible expense or a capital outlay—Depreciation—Goodwill.

The appellant is a publisher of a large number of trade and technical periodicals. It paid $50,000 for the circulation records and subscription lists of the Financial Times and sought to deduct that amount of $50,000 under s. 12(1)(*a*) of the Act as a normal means of acquiring subscribers the cost of which compared favourably with the cost of acquiring them by direct approach.

The appellant has also acquired at the same time the exclusive right to publish the Financial Times, the right to the name, the vendor's advertising and other records, its furniture and fixtures, accounts receivable, inventory of newsprint and goodwill, all for the sum of $25,000.

The Financial Times Limited undertook to change its corporate name and not to compete.

In the Minister's view the appellant purchased a business as a going concern and the expenditure was a non-deductible, non-depreciable outlay.

Held, that the appellant purchased a business as a going concern and with the exception of the amount paid for office equipment and accounts receivable, the real character of the expenditure was for goodwill.

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2. That even if the amount in dispute were not paid for goodwill but for customers lists and address plates, the intrinsic value of the latter was nil and their value lay in the information they contained, which was not depreciable property.
3 That the appeal be dismissed.

APPEAL from a decision of the Tax Appeal Board.

Hon. R. L. Kellock, Q.C. for appellant.

M. A. Mogan for respondent.

NOËL J.:—This is an appeal from the decision of the Income Tax Appeal Board[1], dated April 26, 1965, dismissing appellant's appeal from its income tax assessment for the year 1961 whereby a part of the purchase price of certain assets of a newspaper concern in an amount of $50,000, which had been deducted by the taxpayer, was added to its income.

The appellant, a Toronto corporation, is a publisher of a large number of trade and technical periodicals. On October 27, 1961, it purchased certain assets of a company called Financial Times Limited (sometimes hereafter called The Times) located in Montreal, for the sum of $75,000 in accordance with an accepted offer to purchase, the relevant clauses of which are reproduced hereunder:

October 27, 1961.

Financial Times Publishing Co Ltd,
410 St. Nicholas Street,
Montreal, P Q

Dear Sirs,

We (hereinafter called the "Purchaser") hereby offer to purchase from you (hereinafter called the "Vendor"), upon the terms and subject to the covenants and conditions hereinafter set forth, the following assets of the Vendor, as the same shall exist at the opening of business on the Closing Date, at the prices set opposite the said assets respectively as follows:—

(1) all Canadian subscriptions to the said Financial Times and all circulation lists of Canadian subscribers thereto, including address plates and circulation records; and the Vendor's membership in, and statements and records pertaining to, the Audit Bureau of Circulation,

all for the price of $50,000

and

(2) The exclusive right to publish in Canada a weekly newspaper under the name Financial Times and otherwise to use the said name in Canada and, so far as the Vendor is able to grant the same, the right to use the said name outside Canada for any or all purposes,

[1] 38 Tax A B C 152

and the goodwill of the Vendor's business associated with the said name; all advertising contracts, all advertisers' prospect lists; all advertisers' records and correspondence with advertisers; all files pertaining to the said Financial Times newspaper; all available copies of past issues of the said Financial Times; all invoices or copies thereof to current advertisers in the said Financial Times; all equipment, furniture, fixtures and library; all accounts receivable and inventory of newsprint, if any

all for the price of $25,000

making an aggregate purchase price of $75,000 for all the said assets (hereinafter collectively called the "Newspaper Assets") described in the foregoing subclauses (1) and (2)

1. Notwithstanding anything set out elsewhere herein, the obligation of the Purchaser to complete the purchase of the Newspaper Assets shall be subject to the following conditions which are inserted for the exclusive benefit of the Purchaser and may be waived in whole or in part by it at any time:—

.

(3) that from at least 1st January, 1960, up to the Closing Date the Vendor shall have carried on in the ordinary course its business of publishing at Montreal a weekly financial newspaper under the name Financial Times;

. . .

2 The transaction of purchase and sale provided for herein shall be closed on the 24th day of November, 1961, or such later date as may be agreed upon by the parties, upon which date the Purchaser shall be given possession of all the Newspaper Assets and, subject to adequate provision being made for payment of the creditors of the Vendor listed in the above-mentioned affidavit required by the Bulk Sales provisions of the said Civil Code, shall pay the aggregate purchase price by certified cheque to the Vendor or as it may direct The closing shall take place at the office of the Vendor, 410 St. Nicholas Street, Montreal, at 11:00 a m Montreal time on the Closing Date. The expression "Closing Date" shall mean the 24th of November 1961, unless the date of closing is extended pursuant to this paragraph, in which case the expression "Closing Date" shall mean the extended date of closing

3. The Vendor covenants and agrees with the Purchaser:—

(1) that it will carry on its said business of publishing the said Financial Times in the usual and ordinary course between the date hereof and the Closing Date:

(2) that within thirty days after the closing of the transaction of purchase and sale provided for herein the Vendor will apply to the Secretary of State of Canada to change the Vendor's corporate name so that neither of the words Financial or Times shall form part of the Vendor's name;

(3) that for a period of five years after the Closing Date it will not within Canada, by itself, or in partnership or in conjunction with any other person, firm or corporation as principal, agent, shareholder, lender or in any other manner whatsoever and either directly or indirectly carry on or be engaged or concerned in, or give any advice in, any business similar to the publishing business now carried on by the Vendor.

. . .

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7. It is understood and agreed that after the closing of the said purchase and sale of the Newspaper Assets the Purchaser will assume the obligation of the Vendor to provide the weekly newspaper Financial Times to its Canadian subscribers in accordance with their respective subscriptions thereto, but that the Purchaser will not assume any other obligations or liabilities whatsoever of the Vendor and that the Purchaser will not purchase or acquire any interest in any list of subscribers in the United States of America to the said Financial Times, or any interest in any subscriptions of any such subscribers.

. . .

SOUTHAM-MACLEAN PUBLICATIONS LIMITED,
SOUTHAM-MACLEAN
(Signed) J. A. Daly
(Signed) W. H. Jones

We hereby accept the above offer.

FINANCIAL TIMES PUBLISHING CO. LTD.

(Signed) Deidy E. Erot
President
(Signed) John A. McCorkell
Secretary

In coming to a conclusion herein, three questions must be solved: (1) was the expenditure of $50,000 by the appellant made for the purpose of gaining or producing income within the meaning of section 12(1)(*a*) of the *Income Tax Act* (2) if it was so made, was such payment an allowable expense or was it a capital outlay within the meaning of section 12(1)(*b*) of the *Income Tax Act*, and alternatively, (and in the event the sum paid was not deductible as an expense) (3) are the circulation lists of the subscribers, including address plates and circulation records, purchased from Financial Times Publishing Co. Ltd. tangible capital assets depreciable under section 11(1)(*a*) of the *Income Tax Act* and regulations which deal with capital cost allowances.

There is no question that the expenditure was made "for the purpose of gaining or producing income" within the meaning of section 12(1)(*a*) of the Act and the only matter to be determined with regard to its deductibility is whether this expenditure is an income or a capital disbursement.

The question as to whether a particular outlay by a trader can be set up against income or must be regarded as a capital outlay is not always an easy matter to determine and can be answered only in the light of all the circumstances of each particular case.

The particular circumstances under which the appellant operated its business and purchased the assets of Financial Times Publishing Co. Ltd. will now be considered.

In the fall of 1961, the appellant was operating some 30 odd technical and business journals, serving different fields, deriving revenue therefrom from two sources, subscriptions and advertising. The appellant acquires, maintains and builds up circulation for its publications through its circulation department by (1) direct approach to a subscriber or a prospective subscriber; (2) by purchasing lists of prospective subscribers (from firms who deal in such lists such as from Wallace Publishing Company and Age Publishing Company); (3) by renting such lists of prospective subscribers (from firms such as Might Directories, in Toronto, and Sanford Evans in Winnipeg), and, finally, (4) by acquiring the circulation lists of an existing publication which is going out of business for one reason or another, such as it has done here.

The advertising revenue from which the appellant derives the greater part of its revenue is dependent upon the paid number of subscribers or circulation for a particular periodical, which is audited every year by the Audit Bureau of Circulation, an independent body consisting of advertisers, advertising agencies, publishers of periodicals, newspapers and magazines.

James Alexander Daly, President and Managing Director of the appellant, stated that the latter had been in business since 1880 under different names, publishing trade, technical and business periodicals. He explained that there is a very small profit from the subscriptions on established publications and that the cost of building up new publications is considerably higher. The main source of revenue of the appellant is derived from its advertising and although the cost of same is dependent upon the number of subscribers who receive the periodical, the buying power of the subscriber is also a factor.

The operation of obtaining readers and subscribers to its periodicals is, according to Mr. Daly, a continuing operation by its circulation department, which is charged with the responsibility, not only of seeking new names in each field as new people appear, but also of renewing the existing ones when their subscriptions expire. It is a standard

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practice in the industry to circulate free copies among non-subscribers for a limited period and then ask them to subscribe, and this was done extensively after the appellant purchased the Times.

The cost of printing, supplying and mailing the Times for the first couple of years after the purchase was equal to the total revenue derived from advertising and subscriptions. In addition to the above cost, the appellant had large editorial, advertising and sales expenditures, overhead and rentals.

Mr. Daly further explained that circulation lists of subscribers, no matter how obtained, were of a transitory nature, continually in a state of flux, in the sense that people subscribe, the majority for one year, others for two or three years, and in order to obtain renewals, the interest of the reader in the publication must be maintained. There is also a considerable turnover in the various businesses and fields served with people moving from position to position, being promoted and retired and most of its readers being older people, the mortality and retirement rate is very high.

The appellant became interested in the Financial Times Publishing Co. Ltd. when it was brought to their attention that it was for sale by both their bank (which bank happened to be the same as that of the Financial Times Publishing Co. Ltd.) and the Gazette Printing Company, the Times's publisher.

The Times, according to the first issue published by the appellant on December 1, 1961 (Ex. R-2) had "been devoted to the interests of the Canadian public for 49 years" when in August 1961 its publisher died after an illness of two or three years, during which time he was not able to attend to his business.

Daly explained that the figure of $50,000 for the purchase of the circulation lists of Canadian subscribers, including address plates and circulation records together with the vendor's membership in the Audit Bureau of Circulation and statements and records pertaining thereto, was arrived at because the appellant thought that it was purchasing 5,000 readers and its experience was that to get these readers by direct mail solicitation would cost approximately $10 each. However, instead of getting 5,000 subscribers, it only obtained 2,935 in good standing when an audit was made after the purchase. This discrepancy, according

to Mr. Daly, was due to the fact that the records had been allowed to deteriorate because of the illness of the publisher and the lack of experience of his wife and the rest of the staff.

The circulation of the Financial Times from November 1961 through to December 1963 appears on Ex. R-3 reproduced hereunder:

CIRCULATION OF FINANCIAL TIMES

	In Nov. 1961	Net increase during 1962	Total in Dec. 1962	Net increase during 1963	Total in Dec. 1963
Paid Subscriptions	2,935	4,896	7,831	8,306	16,137
Unpaid Circulation	883	7,855	8,555	474	9,029
Newsstand copies		2,495	2,495	246	2,741
TOTAL		15,246	18,881	9,026	27,907

Of the 2,935 paid subscribers in 1961, 307 had already run out in the three months preceding October 1961, 441 expired in the remaining period of the year, 1,723 expired in 1962, 443 in 1963 and 31 in 1964. Mr. Daly stated that 75 percent of these subscribers, however, renewed their subscriptions. Upon acquiring the assets, the appellant enlarged the circulation promotion department to seek new subscribers and carried on circulation solicitation programmes by spending $91,000 in 1962 and $203,000 in 1963 which, although successful in increasing subscribers, cost $18 per subscriber for the year 1962 and $24 per subscriber for 1963.

The staff of the Times, consisting in eight people and a half-time accountant together with one senior and one junior editor, were all kept on from week to week after the takeover and the periodical continued to be published by the Gazette Publishing Company. The advertising salesman in Toronto remained one year and a half with the appellant and the Montreal salesman remained two years. The clerical staff departed at irregular times in accordance with normal turnover. The staff remained in the Times premises for a few months after the purchase until room could be made in the appellant's own premises.

The circulation records of the Times were kept on Elliot stencils which is a tissue in a card, a specimen of which was

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produced as Ex. 2. These cards were used in a machine to inscribe the name of each subscriber on the periodical for the purpose of distribution; girls typed them on a special carriage with a special ribbon on the typewriter and the names were punched out on a graphotype machine. There were also two lists of Canadian subscribers prepared from the Elliot stencils and glued on to sheets of paper and used, one by the Audit Bureau's auditor and one for the publisher's own internal corrections from month to month. Mr. Daly stated that the original stencils acquired in 1961 were destroyed shortly thereafter because all the appellant's operations were on a different type of system, the speedomat metal plate which is much faster and more durable. He added that the list had to be reconstructed anyway as it was in such a poor shape.

Prior to the purchase of the assets, Mr. Daly had seen the financial statement of the Times for the year ending August 31, 1960 (Ex. 3) which indicated a net loss of $7,466. The financial statement for the year 1961 (Ex. 4), ending August 31, 1961, indicates a net loss of $14,956.43.

Daly explained at p. 88 of the transcript, through a reading of a part of his examination for discovery, the factors considered in arriving at the total purchase price of $75,000 for the assets:

So we had in our own minds, or in our own memorandum here, we decided our top price would be $65,000, but the final negotiations—on the final negotiations we arrived at the figure of $75,000. This was based, in our final consideration, on two factors. One that 5,000 subscribers were worth $10 each, which would be the equivalent cost of getting them, and secondly $100,000 on advertising revenue annually via 25 per cent which is standard commission cost on securing advertising.

The evidence discloses that the appellant was able to secure after the purchase the continued business of 95 percent of the advertisers.

Included in the assets acquired is the exclusive right to publish in Canada a newspaper under the Financial Times as well as the right to use the name in Canada, and outside, which, however, according to Daly, had a negative value only as the Times were in disrepute with their suppliers, their bank, advertisers and agencies. Asked by counsel whether he would have been willing to pay $50,000 for the circulation lists without the name he answered:

A. Yes, if the proposition had been put to us in that way. I think so.

Then he was asked (at p. 44 of the transcript):

Q Well, supposing you hadn't got the right to use the name, what was the alternative?

A. Well, we had been looking into this field previously and we had come to the conclusion that there might be room in Canada for a second publication directed to the financial field, the investor, and the alternative was to start one of our own.

He then later in cross-examination, at p. 83 of the transcript, stated in answer to the following question:

Q So that apart from your reservations, the name must have had some positive value, didn't it?

A. On balance, considering these other factors we decided that we would continue to use the name. It is a very difficult decision to make. I can't really say truthfully whether we decided it had positive value or whether we couldn't do any better with a different name.

HIS LORDSHIP:

Q. What better name could you find for a financial publication?

A None. We thought that adding the name Southam, the reputation of the Southam Company could rehabilitate its image, and I think it has.

The furniture and fixtures purchased had practically no value and were shortly thereafter sold for $20 or $50; $5,698.08 out of a total of accounts receivable of $6,938.86 were recovered by the appellant.

The purchase price was paid by the appellant as follows: $10,006.52 was paid to the Gazette Publishing Company Limited, $29,961.48 to the Financial Times Publishing Company Limited and $35,032 to the Royal Bank of Canada.

Although the accepted offer to purchase (Ex. 1) in paragraph (2) mentions that the goodwill of the vendor's business is sold, Daly stated that there was no goodwill here as, according to its financial statements, it was a losing business.

He further enlarged upon this at p. 84 of the transcript in answer to the following question:

Q. And towards the end of your evidence you offered an opinion which I didn't object to, that there was no good-will to this publication because, in your own words, it was a losing proposition. Is that the only reason you, in your opinion, you held that there was no good-will to it?

A. No, that is a major factor but it isn't the only factor in my mind. Something that is losing and could be made profitable, looking at it from a layman's point of view, not an accountant's, I think would have a residue of goodwill. But the other factors, the editorial

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reputation, the reputation among advertisers that I have mentioned, the reputation in the business community, these were the other factors that were in my mind when I gave that answer.

He then later in cross-examination, after it was pointed out to him that the appellant did acquire 2,935 subscribers of which it retained 75 percent and 85 percent of the advertisers stated at p. 85 of the transcript:

THE WITNESS:

We retained them but we immediately made substantial improvements in the paper, added editorial staff, people with names in the editorial field in Canada. For example, as I say, we hired an editor from the Financial Post who was an associate editor there. I think our retention was based upon the immediate improvements, both in advertising and in subscriptions. If—this was a sick dog when we bought it.

HIS LORDSHIP:

Q. You injected new life into the business?
A. Yes.

Q. That is what you did?
A. Yes, it was dying when we bought it.

MR. MOGAN:

Q. But you knew it was a sick dog when you bought it?
A. Yes, and it wouldn't have gone on for many more weeks.

Mr. M. E. Wright, a chartered accountant, gave evidence on behalf of the plaintiff and on the basis of the financial statements of the Times for 1961 and 1962, confirmed Daly's view that there was no goodwill therein when at p. 102 of the transcript he stated:

A. From my examination of these statements the company is on the verge of insolvency or bankruptcy and in my opinion no goodwill attaches to that company in the accepted accounting sense of the term.

He then, at p. 103, was queried by the Court as follows:

HIS LORDSHIP:

Q. If the condition of the company, if the depressed condition of the company was due to the fact of mismanagement and could be corrected by an injection of new life, couldn't there still be goodwill in a company such as this?
A. Yes, my lord. What the—I think if I may I should give you what I think of as an accountant's definition of goodwill, which is the ability of a company to earn profits in excess of a fair return on the—

Q. Investment?
A. Investment. And if behind these statements there is some undisclosed fact, which given good management, would allow the company to turn around and produce large earnings, I would agree.

Q. You might have a dormant goodwill?
A. There could be a factor of dormant goodwill.

The position taken by counsel for the appellant herein is that as the cost of obtaining subscriptions to the periodicals upon which the advertising revenue depends (which happens to be the appellant's main source of revenue) is an expense to the appellant deductible from its revenue, it should always be so, no matter in which way it is obtained, even if it is obtained in the process of acquiring a new business or all of the assets of a former periodical such as here.

According to the appellant, the cost of purchasing the subscription list here is analogous to stock in trade, as inventory under the *Income Tax Act*, is a very wide concept. Furthermore, the evidence adduced supports the value of $50,000 attached to the subscription list and this amount is therefore not fictitious. The appellant also submits that there was no goodwill attached to the business purchased as there was a history of losses and not of profits, that the subscriptions on the average were for short terms (85 per cent of the 2,935 expired by the end of 1962, the normal subscription was for the year and there was no guarantee at the time of purchase that any subscriber would renew) that the subscribers' contracts are ordinary commercial contracts on revenue account and are not related to the capital structure of the company nor are they assets of an enduring benefit. It was also urged that the purchase of this subscription list was in line with the appellant's policy of always looking for an opportunity of extending its business and occurred in the course of carrying on this business and this expenditure was of the same type as that which the appellant was incurring every day in relation to its other publications. The amount so expended could, therefore, be assimilated to floating assets or circulating capital which the appellant will get back little by little and its cost, therefore, should be a proper expense just as the revenue from its use will be a taxable income.

This apparently plausible submission, that the cost of obtaining subscriptions should always be deductible no matter how obtained is not true under ordinary business principles nor is it especially true in relation to matters of taxation where the solution depends only on the rules laid down by the relevant legislation by reference to which

income for tax purposes is to be measured and under which capital expenditure is not deductible. It is not, indeed, sufficient to say that an expense is analogous to stock in trade or even to an operating expense to render such an expenditure deductible as an operating cost if in fact it was one expended for the acquisition of a capital asset. A rental payment for the pursuit of a business is a deductible expenditure from its operations whereas the capital used in the acquisition of premises (although deductible under the rules governing capital cost allowances) would not be. Yet the amounts expended would be analogous in that both expenditures are used for the purpose of supplying the business with a place to pursue its operations.

Nor is the cost of purchasing the subscription list, as submitted by the appellant, analogous to stock in trade here as the appellant is not in the business of selling subscription lists of customers. The only things sold by it are a publication and advertising space and it therefore appears to me that all those authorities submitted by the appellant which deal with expenditures incurred in the purchase of stock in trade have no relevance in this case.

The appellant's contention that there was no goodwill in the vendor's business can be dealt with shortly by referring to the appellant's offer to purchase which clearly states that its purchase includes goodwill as well as to Mr. Daly's evidence at p. 84 of the transcript that the vendor had a residue of goodwill. Goodwill in a business, in my view, is not restricted, as submitted by Mr. Daly or by Mr. Wright, to "the ability of a company to earn profits in excess of a fair return on the investment" but involves in a large measure both the value of its assets and its potential earning power and the amount expended by the appellant for the purchase and exclusivity of the vendor's business and the exclusive use of its name was based on the potential earning power of the business acquired.

At the hearing Mr. Daly was quite critical of the value of the business acquired in an attempt to establish that there was no goodwill in the vendor's business at all and that the company being in disrepute with the bank, the advertising agencies and its publisher, the name had a negative value only. The facts reveal, however, that there was enough

value therein to cause the appellant to disburse $75,000 for the acquisition of the newspaper and the use of the name which it is still using today together with 2,935 subscribers, 75 percent of which it retained after their subscription had expired and $100,000 in advertising contracts of which 85 percent were retained and the advantages thus obtained were of a continuing and not of a transient nature. It therefore appears that the appellant considered the positive factors of the business and of the name of the vendor and on this basis established the value of its potential earning power. In *Foster v. Mitchell*[1] Teetzel J. said at p. 428 *et seq*:

As stated in Lindley on Partnership at p. 476, the expression "goodwill", when applied to a business "is generally used to denote the benefit arising from connection and reputation and its value is what can be got for the chance of being able to keep that connection and improve it."

Or as put by Lord MacNaughton in *Inland Revenue Commissioners v. Muller*[2] at pp. 223-224:

...It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.

In *Dominion Dairies Ltd. v. M.N.R.*[3] Gibson J. held that in the purchase of a dairy business that part of the purchase price imputed to customers' lists and related information was purchased goodwill and, therefore, a capital asset. In *Schacter v. M.N.R.*[4] Thurlow J. also held that the purchase of an accountant's list of accounts in the course of the purchase of his business was also goodwill and not deductible.

Goodwill is also, as stated in *Trego v. Hunt*[5] at p. 8, with reference to what Wood V.C. said it must mean in *Churton v. Douglas* (Joh 174,188):

...every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business.

[1] 3 O.W.N. 425.
[2] [1901] A.C. 217.
[3] [1966] C.T.C. 1.
[4] [1962] C.T.C. 437.
[5] [1896] A.C. 7.

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In the same case reference was also made to what Sir George Jessel stated when discussing in *Ginesi v. Cooper*[1] the language of Wood V.C. in the *Churton v. Douglas case (supra)*:

> Attracting customers to the business is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill.

Looking at the nature of the purchase by the appellant of the vendor's assets here, it appears to me that with the exception of the office equipment, which the appellant sold shortly after the purchase for $50.00 and $5,598.08 recovered for accounts receivable, the real character of the balance expended is all goodwill as it was related only to customers of either a reader or an advertiser and I should add that this is not only what the appellant purchased but it is also the only valuable thing the vendor had to sell.

Whether the expenditure by the appellant of the amount of $50,000 is goodwill or not, there is however a further reason for disallowing it as an operational expense if it happens to be an outlay of a capital nature.

The question of determining the capital or revenue nature of a particular outlay is not always an easy matter and a great number of decisions have been rendered based, however, always on the circumstances of each particular case.

In *Regent Oil Ltd. v. Strick Inspector of Taxes*[2] at p. 658 Lord Morris of Borth-Y-Gest stated:

> In some cases payments can by general assent be recognized at once as being either of capital or of revenue nature. Where dispute arises a court must do its best to assess the value and the weight of all the particular features which may point to one conclusion or the other and, in doing so, to have in mind the legal image which a wealth of judicial utterance reveals.

The difficulty resides in being able to distinguish an outlay made for the acquisition of the means of production and the use of such means or, as put differently, in *New State Areas Ltd. v. Commissioner of Inland Revenue*[3] at p. 621:

> The contrast has been observed between expenditures forming "part of the cost of improving or adding to the income-earning plant or machinery" and "part of the cost of performing the income earning operations."

[1] 14 Ch. D. 596.
[2] [1965] 3 W.L.R. 636
[3] S.A.L.R. (1946) A.D. 610

In *Robert Addie & Sons Collieries Ltd. v. Inland Revenue*[1] the Lord President (Clyde) queried at p. 235:

> Is (the expenditure) part of the company's working expenses; is it expenditure laid out as part of the process of profit earning or, on the other hand, is it a capital outlay; is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?

Counsel for the appellant cited a great number of authorities which, however, deal with an expenditure made in the course of the carrying out of a trade. Now, as already mentioned, the question of determining in such a situation whether a particular outlay by a trader is on account of capital or income is a rather difficult matter to resolve. This appears particularly so from two recent decisions, one of which *B. P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia*[2] was cited by the appellant as sustaining its case where an expenditure was held to be deductible from operations and another dealing with substantially the same facts, where the House of Lords held the contrary view in *Regent Oil Co. Ltd. v. Strick*[3]. The matter is much easier of solution, however, in the case of the purchase of a business as a going concern, when the expenditure (if it is not clearly for the purchase of stock in trade) is always a capital outlay and this has been so ever since the decision in *City of London Contract Corporation Limited v. Styles*[4] in 1887 to which I referred to in *Seaboard Advertising Co. Ltd. v. M.N.R.*[5] and which was referred to in *John Smith & Son v. Moore*[6] by Lord Sumner as never having been questioned. In this case a company acquired a business including unexpired income producing construction contracts, and that part of the purchase price being allocated to the cost of these contracts was not permitted to be deducted from profits on the basis that it was part of the capital invested in the business. The sum was paid with the rest of the aggregate price to acquire the business and thereafter profits were made in the business; the sum was not paid as an outlay in a business already acquired, in order to carry it on and to earn a profit out of this expense as an expense of carrying it on.

[1] 8 T.C. 676
[2] [1935] 3 All E.R. 209.
[3] [1965] 3 W.L.R. 636.
[4] 2 T.C. 239.
[5] [1965] C.T.C. 320.
[6] 12 T.C 266.

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The matter is also clearly set out by the Privy Council in *Nchanga Consolidated Copper Mines*[1] at p. 213 (an authority cited by the appellant) by Viscount Radcliffe when he stated:

> While, no doubt, money paid to acquire a business or to shut a business down for good or to acquire some contractual right to last for years may well be capital expenditure...

This applies clearly to the situation found in the present case as the appellant instead of starting a new business or a new periodical addressed to a new group of subscribers in the financial field, purchased and made an expenditure to acquire a business already existent including the membership for such periodical or business in the Audit Bureau of Circulation (one being required for each periodical issued or operated by the appellant) and thereby added one more business or periodical to its 30 odd periodicals it had at the time. I should interpolate here that whether the purchase price was segregated or not or whether the segregated price paid for the subscribers' list or plates compared with the expenses, the appellant would have had to make to obtain these subscribers had it started a new business should make no difference whatsoever if such expenditure is made in the purchase of a business.

That the appellant here purchased a business as a going concern cannot be contested. The agreement of October 27 together with Daly's evidence clearly establishes that the appellant paid an "aggregate purchase price of $75,000 for all the newspaper assets" and the sum of $50,000 in issue here is a part of that purchase price. In paragraph 2 of the agreement, the vendor was required to undertake, and undertook, to carry on the ordinary course of its business of publishing the periodical under the name Financial Times until the closing date when the appellant took over, and although the appellant's president stated that it had bought a dead dog, this indicates that it was only going to buy it if it survived and was maintained in operation. In subparagraph (2) of paragraph 3 of the agreement, the vendor covenanted and agreed to change its name (the name had already in the first page of the agreement been sold to the appellant) which, of course, confirms that a newspaper, part of a going concern, is being acquired and the name is part of the newspaper asset. In subparagraph

[1] [1964] 1 All E.R. 208.

(3) of paragraph 3 of the agreement, the vendor covenants not to compete, and this also is normal and incidental, to the purchase of a business. In paragraph 7 of the agreement, there is a provision whereby after the closing of the said purchase and sale of the newspaper assets, the purchaser will assume the obligation of the vendor to provide the weekly Financial Times to subscribers in accordance with their subscription and this was carried out by the appellant with the result that the ownership of the newspaper changed hands without a single break in the constant flow of issues to what subscribers the paper had. Finally, the acquisition of a business is further confirmed by an excerpt in the first issue of the periodical published by the appellant entitled "A Message from the Publisher" which reads as follows:

> The Financial Times has been devoted to the interests of the Canadian investing public for 49 years.
>
> With this issue Southam-MacLean Publications Ltd. assumes *ownership and publication of the old established financial weekly*. The news-gathering facilities and resources of Southam-MacLean Publications Ltd. and the Southam Co. Ltd. will be utilized as rapidly as possible; and their effect should become increasingly evident from issue to issue.
>
> Plans for major changes in policy are under discussion and target date for their completion is March 1st, 1962.
>
> It is the intention of Southam-MacLean Publications to carry on the traditions of The Financial Times, and we hope for a long, happy productive relationship with you, our readers. (the emphasis is mine).

I should also add that the evidence of Wells is to the effect that according to the appellant's investigation of the market there was place for two investment periodicals in Canada and two of them, the Financial Post and the Financial Times existed at the time. Having purchased the latter and insured that the former owners would not compete with them, the appellant thereby obtained a good part of the exclusivity of this field and the exclusion of what might have been serious competition, which must also be considered as indicating the purchase of an advantage of an enduring nature and points also to the outlay being one of capital rather than of revenue.

I now turn to appellant's alternative argument which is that if the $50,000 is not a current expense, it was expended for a tangible asset depreciable under the regulations which deal with capital cost allowances. In view of my holding that the amount of $50,000 was paid for goodwill which is

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an intangible, such a submission becomes untenable. However, even if it is not goodwill, the intrinsic value of the customers' list or of the address plates are nil. The list was merely a document listing the subscribers and the address plates had no value as the evidence discloses that they were destroyed a few days after the purchase. The costs of the lists or the plates were only goodwill costs (compare *Shacter v. M.N.R. (supra)* and the lists or the plates merely represented the manner in which the customers' names were recorded. The information on the lists or plates, the customers' names were the value to the appellant and not the plates or the lists in themselves and they were shortly replaced by other plates.

It therefore follows that when all the circumstances of the present case are considered and all the authorities are looked at, it appears clearly that an asset such as that acquired by the taxpayer in the present case must be regarded as a non-tangible capital asset and, therefore, cannot be depreciated under the capital cost allowance regulations nor can it be deductible as an operational expense.

The appeal is dismissed with costs.