1960
Oct. 6, 7, 11, 12
1962
Mar. 21

BETWEEN:

PARSONS-STEINER LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income—Income tax—Compensation received by agent for loss of agency—Capital receipt or income.

The appellant company was incorporated in 1930 to carry on the business of a manufacturer's agent and wholesale merchant dealing in china and related wares. From its inception the appellant represented the manufacturers of the Royal Albert line of tea ware and in 1933 became sole agent in Canada for the sale of dinner, tea and toilet ware and ornamental and other goods manufactured by Doulton & Co. Ltd. The two agencies were the principal ones which the appellant operated and accounted for 80% of its business. As exclusive agent for Doulton & Co. Ltd., the appellant was remunerated by a commission on all sales in Canada whether the order was secured by it or placed directly by the customer. The Doulton products sold by the appellant consisted principally of dinnerware and figurines and there was no competition between these lines of goods and the other lines the appellant sold.

The agency agreement between the appellant and Doulton & Co. Ltd., provided that it should remain in force for one year from March 31, 1933, and it was determinable upon three months notice given by either party. The agency in fact was continued to December 31, 1955 and was not terminated by notice but by an agreement made early in 1954 which culminated negotiations begun some time previously when the English company decided to set up a Canadian sales subsidiary.

Pursuant to the agreement terminating the agency, Doulton & Co. Ltd. paid the appellant $100,000 "in full settlement of your claim for damages for loss of rights under the agreement".

In re-assessing the appellant for the 1956 taxation year the Minister added this payment to the appellant's declared income. In an appeal from the assessment the appellant, while admitting that $5,000 of the amount was income, contended that the remainder was capital.

Held: That, except in so far as it was a consideration for services rendered to Doulton & Co. Ltd. in connection with the take-over by its subsidiary, which is admitted to be income, and except in so far as it took the place of commissions on sales of goods ordered before, but invoiced after December 31, 1955, the payment was not income from the appellant's business but was referable to the appellant's claim for loss of what it and Doulton & Co Ltd. considered to be the appellant's interest in the goodwill and business in Doulton products in Canada.

2. That this was a capital asset of an enduring nature and the payment received in respect of its loss was accordingly a capital receipt.

Wiseburgh v. Domville [1956] 1 All E.R. 754 at 757,760; *Commissioners of Inland Revenue v. Fleming & Co. (Machinery) Ltd.* 33 T.C. 57 at 61, referred to.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

H. H. Stikeman, Q.C. and *P. N. Thorsteinsson* for appellant.

G. W. Ainslie for respondent.

THURLOW J. now (March 21, 1962) delivered the following judgment:

This is an appeal from a re-assessment of income tax for the year 1956, the issue between the parties being whether the whole of a sum of $100,000 received by the appellant from Doulton & Co. Limited in that year following the termination of an agency relationship was income from the appellant's business. The appellant admits that $5,000 of the amount in question was income but contends that the remainder of it was capital.

The appellant was incorporated in 1930 and since then has carried on business on a considerable scale as a manufacturer's agent and as a wholesale merchant dealing in china and related wares. From the commencement of its operations the appellant represented the manufacturers of the Royal Albert line of tea ware and in 1933 it became the sole agent in Canada for the sale of dinner, tea and toilet ware and ornamental and other goods, manufactured

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by Doulton & Co. Limited. These two agencies were the principal ones under which the appellant subsequently operated and they accounted for approximately 80% of its business but several other agencies of minor importance were acquired from time to time and some of these were discontinued or terminated during the period from the incorporation of the company to the end of 1955.

As exclusive agent in Canada for Doulton & Co. Limited, the appellant sold goods of its principal's manufacture to buyers of large quantities on the principal's account and was remunerated by a commission on all sales made in Canada whether the order was secured by the appellant or was placed directly by the customer. But the appellant also purchased Doulton goods on its own account for sale as a wholesaler to smaller customers. Though tea ware is mentioned in the agency contract, the Doulton products sold by the appellant consisted principally of dinner ware and figurines and there was no competition between these lines of goods and the Royal Albert or other lines which the appellant sold. Moreover, while there were other lines of figurines on the market some of which were of finer quality and more expensive while others were of lower grade and not so expensive, the Doulton figurines, which accounted in the last two or three years to about 55% of the appellant's sales of Doulton products, were in a class by themselves in which there was no real competition from those of other makers.

The agency agreement between the appellant and Doulton Co. Limited provided that it should remain in force for one year, from March 31, 1933 and thereafter until determined by a three months notice which might be given by either party. In fact, the relationship continued until December 31, 1955, when it terminated pursuant to an agreement between the parties rather than pursuant to a notice of the kind mentioned in the agreement.

The appellant's sales—other than those for which it received commission—in the last four years of the relationship and the four following years and the commissions earned in the same years were as follows, the years being fiscal years of the appellant ending on June 30 in each year.

Year	*Sales*	*Doulton sales only*	*Commissions*
1952	1,051,000	671,000	176,000
1953	825,000	417,000	162,000
1954	777,000	328,000	134,000
1955	844,000	404,000	144,000
1956*	729,000	(no figure given)	151,000
1957	509,000		98,000
1958	474,000		84,000
1959	546,000		113,000

During 1953 correspondence passed between the appellant and Doulton & Co. Limited from which it appears that the latter was contemplating termination of the agency and early in 1954 a representative of that company came to Canada where discussions on that subject took place between him and the President of the appellant company. The situation which this presented from the point of view of the appellant appears from two letters written on behalf of the appellant to the representative of Doulton & Co. Limited at or about that time, the first dated January 18, 1954, and the second January 26, 1954, which I shall quote in full:

Mr. K. Warrington,
Doulton & Co. Limited,

Dear Ken:

It is our understanding that Doulton Limited are desirous of terminating their present Canadian agency arrangements, and establishing a wholly-owned subsidiary to represent their factories in this market.

Our firm naturally learns of this decision with considerable regret. Not only have we and Doulton become synonymous in the Canadian chinaware trade, but the happy and successful association of over twenty years duration is not lightly put aside. Because of the personal pride in your products which the principals of our firm have always felt, the Doulton side of our business has had pre-eminent consideration in our sales efforts, and consequently the results rival in volume the total business of all our other agencies combined.

It appears to us, however, that all our discussions concerning a fair and equitable settlement on which this "take-over" is to be based, is largely a matter of arriving at a valuation acceptable to us both of an established earning power, which we are giving up, and which will henceforth accrue to you.

This is not just a figure to be pulled out of the air. Negotiations based on such "horseback" appraisals seldom have a happy outcome. Accordingly, we have compiled the earnings figures (see exhibit attached) from our records, to try and determine a value for the Doulton side of our

*1956 includes six months of the Doulton agency and six months following its termination.

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business. You are no doubt able to verify these figures from your own records of Canadian sales and shipment, but we will be pleased to place our accounting records at your disposal, should you wish to verify them here.

It is apparent that our Canadian Doulton agency provides an average net earnings to Parsons-Steiner Limited of $75,000 per annum, after its proper share of our total overhead, and after deducting the corporation income tax applicable.

In arriving at the value of private businesses for purposes of sale, valuation, or assessment for inheritance taxes, the ratio of capitalizing in current use is 6⅔ to 8 times annual net earnings. Leaning your way (6⅔ times), this works out to a capitalized value of $500,000.

At this point in our calculation, we stopped and gave thoughtful consideration to the matter of how much of the successful development of the Doulton market in Canada has been a joint effort, in the sense that you as manufacturers had created an acceptable product, and that we have done a fine job of establishing and servicing a distribution organization which you can be proud to take over without modification.

In the light of this partnership aspect of our Canadian development, I personally have insisted that we split the above figure, 50-50%. This amount ($250,000) is the price of what we are discussing. You may be assured that in this price, there is included the continued goodwill and co-operation of this firm, and all its personnel, towards your new Canadian venture.

Sincerely,
President.

* * *

January 26, 1954.

Mr. J. K. Warrington,
Doulton & Co. Limited,
Royal Doulton Potteries,
Burslem, Stoke-on-Trent,
ENGLAND.

Dear Ken:

In the light of the discussions we have had together, since outlining our views to you in my letter of January 18th, we are prepared to modify our ideas.

Assuming that our present arrangements will continue as they are until December 31, 1954, we would feel compensated for the loss of our valued agency agreement with you at that time, if paid—

$175,000 either in cash *or* in the form of—

$175,000 par value 6% cumulative redeemable first preferred shares of Doulton (Canada) Limited

(or of whatever subsidiary Canadian company is incorporated to carry on here at that time).

These shares would carry the rights and privileges usually attached to preferred stock issues when created for sale to the public in Canada. They would be redeemable, all or in part, at the option of the issuing company

at 100% during 1955
at 101% during 1956
at 102% during 1957
at 103% during 1958
at 104% during 1959
or at 105% thereafter.

After 1956, a minimum of 10% of the original issue to be retired in each subsequent year by sinking fund at the prevailing call price.

As an optional plan, if you agree to extend our present agency arrangements a further year (to December 31, 1955) we would alter the above proposal to read

$100,000 in cash, or in said preferred shares.

It is our understanding that, at whatever take-over date is decided, we will be paid the commissions outstanding on business done between us as of that date; that you will buy, as well, our Doulton inventory at landed cost prices.

We agree to co-operate fully in your suggestion that one or two Doulton & Co Limited employees be associated with us here for any period prior to the take-over date. They will be given office accommodation, and every opportunity to familiarize themselves with the Doulton distributing aspect of our business.

Yours very truly,
PARSONS-STEINER LIMITED,
President.

Some time after these letters were written, Mr. Ernest Steiner, the President of the appellant and his son went to England where further discussions took place in which an agreement was reached and on April 29, 1954, Doulton & Co. Limited wrote to Mr. Steiner as follows:

Dear Mr. Steiner,

The subject of our recent conversations at Doulton House in connection with the ending of the Agency were submitted to the Board today and they have confirmed the proposition which we mutually agreed on Wednesday, 14th April. The sum of $100,000 will therefore be payable to your company subsequent to the termination of the Agency, this amount to include payment for such services as you will render in connection with our takeover of the Agency and also to take into account the fact that no commission will be payable to your company on goods invoiced after 31st December, 1955.

I hope to be in Toronto with Warrington in October and this will give us the opportunity to discuss with you the progress of the measures necessary to implement the agreement.

Yours sincerely,

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Pursuant to the arrangement so made the appellant continued to act as agent for Doulton & Co. Limited throughout the remainder of 1954 and the whole of the year 1955 and in the meantime afforded to Doulton & Co. Limited the office facilities and co-operation referred to for the purpose of facilitating the smooth transfer of the operation to its new Canadian subsidiary. Employees of Doulton & Co. Limited were accommodated by the appellant and its staff made a point of introducing such employees to customers who called at the appellant's place of business. The appellant pleads that these services were worth $5,000 and it is with respect to them that the appellant concedes that $5,000 of the $100,000 in question was income.

On the termination of the agency, two of the appellant's seventeen employees became employees of the Doulton subsidiary and thereafter orders addressed to the appellant for Doulton goods were referred to the Doulton subsidiary as the appellant no longer sold such goods even on its own account. In order to counteract the expected drop in sales the appellant employed several new salesmen and made a greater effort than formerly to augment sales of the lines which it still carried. There was no change made in the premises occupied by the appellant and no salaries were cut as a result of the loss of its Doulton agency. One new agency was obtained but no agency could be obtained for a line of figurines comparable with the Doulton line.

Payment of the $100,000 was forwarded early in 1956 with a letter which read as follows:

2nd January, 1956.

E. A. Steiner, Esq.,
Messrs. Parsons-Steiner Limited,
55-57 Wellington Street West,
Toronto 1, Canada.

Dear Mr. Steiner,

As arranged I have pleasure in enclosing my company's cheque for $100,000. As we do not admit liability we regard this sum as a voluntary gesture to maintain our good name in Canada and you have agreed on behalf of your company to accept it in full settlement of your company's claim for damages for loss of rights on the cancellation as at 31st December, 1955 of the agreement hitherto existing between our two companies.

A signed copy of this letter is enclosed: will you please sign and return the original to me as a receipt and acknowledgement that the agreement between the two companies is hereby cancelled as of 31st December, 1955 and that you accept the sum of $100,000 in full settlement of your claim for damages for the loss of rights under the agreement.

Yours sincerely,
Managing Director

Received from Doulton & Co. Limited the sum of $100,000 in accordance with the above terms.

This was acknowledged by a letter of January 4th, 1956, from the appellant to Mr. E. Basil Green of Doulton & Co. Limited which simply said:

Dear Mr. Green:

This is to acknowledge with thanks your cheque for $100,000.00 in respect to damages on termination of our contract.

Yours very truly,
PARSONS-STEINER LIMITED
E. A. Steiner.

The question to be determined is whether the $100,000 was profit from the appellant's business. If so, it is income in respect of which the appellant is liable to tax. If not, it is conceded that there is no basis for tax liability in respect to it.

So far as I am aware, there is no case of this kind reported in Canada but a number of cases in the Courts of England and Scotland were cited in the course of the argument. What appears most clearly from these cases is that the question is largely one of degree and depends on the facts of the particular case and the inferences to be drawn therefrom. For the purposes of this case the distinction drawn in the cases appears to me to be summed up in the following passage from the judgment of Lord Evershed, M.R., in *Wiseburgh v. Domville*[1]:

Was this sum paid by way of damages in respect of this agency contract "profits or gains" arising from the trade of the taxpayer as a sales agent? The argument of counsel for the taxpayer had the attraction of simplicity. He said the £4,000 was paid to the taxpayer in exchange for a profit-earning asset which he had lost owing to the breach of the contract by the company, and it followed that it was a capital item. If the question were res integra that argument would be more attractive still, but it clearly will not stand as a test in the light of the authorities. For the most part these authorities are decisions of the Inner House of the

[1] [1956] 1 All E.R. 754 at 757.

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Court of Session in Scotland which do not bind this court. But the Income Tax Acts apply indifferently on either side of the border, and I should be slow to adopt a new approach to the incidence of taxation in England from that established in Scotland. In other words, I feel we should follow the line of the Scottish decisions and the principle which can be extracted from them.

In *Kelsall Parsons & Co. v. Inland Revenue* (1938) (21 Tax Cas. 608), Lord Normand (Lord President), said (ibid., at p. 619):

". . . no infallible criterion emerges from a consideration of the case law. Each case depends upon its own facts . . ."

That case is perhaps very much at one end of the line and *Barr, Crombie & Co. v. Inland Revenue* (1945) (26 Tax Cas. 406), very much at the other. In the former the business of the taxpayer company was that of agents for manufacturers. At the relevant date they had far more agency contracts than the taxpayer here, however, and the sum under consideration by the Inner House was paid for cancellation of a contract which would have determined in any event in a relatively short time and in regard to which, as Lord Normand says, the taxpayer had no reasonable expectation of its further continuance.

However, junior counsel for the taxpayer points out that the present case is really distinguishable in a significant degree on its facts. First, the taxpayer here held but two agencies. Secondly, although the present agency was expressed to be determinable at relatively short notice, there would have been no reason to suppose that it would have been if all had gone well. And thirdly, as the commissioners pointed out, the effect of the loss of this contract, quoad the taxpayer's agency business was very substantially to depreciate his earnings: whereas in *Kelsall Parsons & Co. v. Inland Revenue,* the court pointed out that the taxpayer's earnings out of the agency business were not much different from what they had been before the cancellation of the material contract. I agree that this case differs in these respects from *Kelsall Parsons & Co. v. Inland Revenue.* But I am unable to agree that those differences are of such significance as to bring it from the territory, so to speak, of *Kelsall Parsons & Co. v. Inland Revenue* into that of *Barr, Crombie & Co. v. Inland Revenue.* On its facts, the present case more closely resembles *Inland Revenue v. Fleming & Co. (Machinery) Ltd.* (1951) (33 Tax Cas. 57), and, as already indicated, I must resist counsel's invitation to refuse to follow the Scottish line of authority.

To bring the case within the *Barr, Crombie* territory the taxpayer must be shown to have parted in truth and in substance, not merely with his rights and expectations under a contract *entered into in the ordinary course of his trade, but with one of his enduring capital assets, as it is called. On that sort of consideration this case might well have been different if the £4,000 had been paid because the taxpayer's goodwill had been damaged. In Barr, Crombie & Co. v. Inland Revenue the agency cancelled amounted to the substance of the whole business of the taxpaying company.* Its receipts accounted for nearly nine-tenths of the total earnings and its loss necessitated the complete reorganization of the company's business, a reduction in their staff, and the taking of new and smaller premises. In effect, a substantial part of the business undertaking had gone. Here, the taxpayer has been carrying on a business which for thirteen years has shown variations in the actual agreements which it has comprehended. The business has suffered something perhaps

of a disaster by reason of this quarrel with a valuable customer. But, beyond that, it seems to me it is not right to say that the taxpayer had his undertaking as a sales agent partially destroyed or taken away.

But, the matter being largely one of degree and so of fact, as Lord Normand said, I think the question is one of fact for the commissioners to find. On the facts of this case it seems to me that they were justified in finding, without any misdirection of law, that the amount awarded to the taxpayer was a taxable profit, i.e., a part of the profits or gains arising from the business for the year in question. Harman, J., said ([1955] 3 All E.R. at p. 551):

The taxpayer was a manufacturers' agent. He had other agencies from time to time and carried on business as an agent, and one of the incidents of such businesses is that one agency may be stopped and another begun. The fact that an agency was a key agency, and was therefore important to him and represented half of his income, seems to me to be irrelevant.

With the possible exception of substituting "inconclusive" for "irrelevant", I agree entirely with that statement; and I agree with what the judge said later (ibid.):

". . . it was a normal incident in this kind of business that an agency should come to an end, and it seems to me that the compensation paid is quite clearly income."

I agree with Harman, J., and I agree with him on the ground that this was a legitimate conclusion which the commissioners on the facts of the case were entitled to find. For these reasons, I think this appeal fails.

Earlier in the judgment Lord Evershed had referred to the taxpayers action for damages for breach of the agency contract and had said at page 757:

The taxpayer might have alleged that, apart from the loss of commission, the damage to him lay in the fact that, if the determination was wrongful, his goodwill as sales agent in this line of business was seriously impaired thereby. A reference to that matter is found in the commissioners' statement of facts. *I can well conceive that the taxpayer would have had a strong case for saying that damages would not be taxable, in so far as they were claimed because his goodwill as a sales agent had been impaired.*

and further on the same page:

I think one other inference must be drawn from the form of the judgment read in the light of the pleadings—I do not forget that this is a consent order under a settlement in which no doubt both parties considered all their alleged rights and defences. *On the face of it, it is impossible for the court to infer that this £4,000 or any part of it represented damages for the loss of the taxpayer's goodwill. I think the form of the pleadings and the amount of the damages really make that impossible.*

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Birkett, L.J. observed the same point at page 760 where he said:

> The taxpayer says through his counsel that it was a payment "for injury to the goodwill of my business". I agree with what the Master of the Rolls has said about that. The whole of this statement of claim, detailed as all the complaints are, contains no breath of a suggestion of that kind. It is confined wholly to the loss of commission. All the details in the pleadings, the defence and reply, really go to that purpose.

The question of whether the sum was paid for an injury to the goodwill of the business was thus resolved at the outset against the taxpayer but the issue still remained whether the sum was a profit of the trade and this issue was then decided on the facts of the case one of which was that the sum was not paid in respect of an injury to the goodwill of the taxpayer's business.

Of the cases cited that nearest in principle to the present one, in my opinion, is *Commissioners of Inland Revenue v. Fleming & Co. (Machinery) Ltd.*[1] where The Lord President (Cooper) said at page 61:

> The sum of £5,320 was paid to the Company as compensation for the loss of an agency which they and their predecessors had held for some 50 years as sole selling agents of explosives in Scotland for Imperial Chemical Industries, Ltd. and their predecessors. The problem thus belongs to a type exemplified by a number of recent cases in which, broadly speaking, the line has been drawn in the light of varying circumstances between, (*a*) the cancellation of a contract which affects the profit-making structure of the recipient of compensation and involves the loss by him of an enduring trading asset; and (*b*) the cancellation of a contract which does not affect the recipient's trading structure nor deprive him of any enduring trading asset, but leaves him free to devote his energies and organisation released by the cancellation of the contract to replacing the contract which has been lost by other like contracts. It is not possible briefly to formulate the distinction exhaustively or with complete accuracy, as the circumstances may vary infinitely; but a sufficient indication of the relevant considerations is found by contrasting such cases as *Van den Berghs, Ltd.*, [1935] A.C. 431, and *Barr, Crombie & Co.* [1945] S.C. 271, in which the payment was held to be of a capital nature with *Short Bros.*, 12 T.C. 955, and *Kelsall Parsons & Co.* [1938] S.C. 238, in which the payment was held to be of a revenue nature. These and other cases cited to us are relatively easy cases once the governing principle has been established for on their facts they all fall more or less unmistakeably on either the one side or the other side of the line. In this instance the difficulty is created by the fact that "the substance of the transaction" cannot easily be equated with the formal deed by which the transaction received effect. *Indeed I should almost be prepared to say that if attention is concentrated upon the business substance of this transaction the payment should be treated as a capital payment,* whereas if attention is concentrated upon the form the payment should be treated as a revenue payment.

[1] 33 T.C. 57.

In the *Fleming* case it appears from the reasons for judgment that the taxpayer lost on the question at issue largely because of the form of the transaction which provided for a payment as "compensation for the loss of the agency", which was the sum in question, and for a separate payment for which the taxpayer undertook to abstain from engaging in the explosives business and to do everything in its power to prevent any loss of goodwill or connection between the principal and its customers. It was conceded that the latter sum was not income.

Turning now to the facts of the present case I think the evidence makes it plain that the loss which the appellant faced when Doulton & Co. Limited made known its intention to terminate the agency was not merely one of the loss of one of a number of agencies but of an agency which accounted for a large proportion of the appellant's total business and in which was included a line of figurines which alone accounted for a considerable portion of the business and which was unique in the trade. For twenty years the appellant had had the agency for that particular line of goods and had built up the market for these figurines and for the other Doulton products which it sold. While the loss of the agency would set the appellant free to take on competitive lines a market for some other manufacturers' dinner ware would have to be promoted and built up and there was not even such an alternative with respect to the figurines for there was no comparable line on the market.

Against this background the appellant's letter of January 18th, 1954, using as it does expressions such as "take-over", arriving at a valuation . . . of an established earning power, which henceforth will accrue to you", "capitalized value" and "price" is clearly a request for payment for the loss of what the appellant regarded as its interest in the earning power and goodwill of the business in Doulton products on the Canadian market, a loss which the appellant expected to sustain as a result of the action which Doulton contemplated taking.

In this respect the case differs widely from the situation in *Wiseburgh v. Domville* where as pointed out in the passages quoted no claim in respect of damage to or loss of goodwill had been asserted and it is more nearly akin to the payment in the *Fleming* case for the undertaking not

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to carry on the explosives business and to assist in retaining goodwill. Moreover, while the settlement ultimately agreed upon in the present case differs in terms from that asked in the letter of January 18th, 1954, when one considers that the agency was said to produce $75,000 a year after taxes, for practical purpose the settlement agreed upon was the equivalent of the amount claimed. Nor is there in the changes of expression in the appellant's later letters, one of which refers to "loss of our valued agency" and another to "damages on termination of our contract", anything which in my view alters the substance of that for which a settlement was originally asked. In substance what appears to me to have happened was that in its letter of January 26th, 1954, the appellant altered its claim or price of $250,000 and offered in its place two alternatives, the first of which involved a continuation of the agency for roughly one year plus a payment of $175,000 in cash or preferred shares of the Doulton subsidiary and the other a continuation of the agency for almost two years plus a payment of $100,000 in cash or preferred shares of the subsidiary and it was the latter alternative which formed the basis of the settlement ultimately made. But neither this nor the letter which accompanied the payment, nor the reply to it in my view made any change in what the claim or price was for or in what the payment represented in the appellant's hands. Indeed the Doulton letter of January 2nd, 1956, which accompanied the payment, in referring to "your company's claim for damages for loss of rights ... on the cancellation of the agreement" appears to me to confirm that the settlement was a settlement of the claim which had been asserted.

One may, I think, usefully examine the payment from another angle as well. In my view it was clearly not a payment for arrears of earned commission or in lieu of earned commission for the appellant received the commissions earned to the end of 1955 and though the Doulton letter of April 29th, 1954 referred to commissions on goods ordered before but invoiced after December 31st, 1955 the business was so arranged that there were no commissions or practically none to which this provision could apply. To the extent that there were any such commissions, I think, the payment would represent taxable income. Nor was it a payment in lieu of commissions that might have been

earned to a normal termination of the agency contract and which were lost because of a premature termination of it. So far from there being a premature termination the effect of the arrangement was to defer termination far beyond the time when it might lawfully have been brought about. Nor is the sum a payment in lieu of notice or a payment made to obtain an early termination of the agency or a bonus for services rendered, for no claim for it was put forward by the appellant on any such basis and no such basis is suggested in the correspondence or in the other evidence. Nor is the payment merely one referable to an alteration of the terms of a contract made in the course of the appellant's business. Such an explanation in my opinion does not account satisfactorily for a payment of such size and particularly so where the alteration of the contract was at the appellant's request and to its advantage.

On the whole therefore having regard to the importance of the Doulton agency in the appellant's business, the length of time the relationship had subsisted, the extent to which the appellant's business was affected by its loss both in decreased sales and by reason of its inability to replace it with anything equivalent, to the fact that two of the appellant's employees became employees of the Doulton subsidiary on the termination of the relationship and the fact that from that time the appellant was in fact out of that part of its business, both as an agent and as a wholesale dealer, and particularly to the nature of the claim asserted in respect of which the payment was made, I am of the opinion that, except in so far as it was a consideration for services rendered to Doulton & Co. Limited, in connection with the take-over by its subsidiary, which is admitted to be income, and except in so far as it took the place of commissions on sales of goods ordered before, but invoiced after December 31, 1955, the payment in question was not income from the appellant's business, but was referable to the appellant's claim for loss of what it and Doulton Co. Limited as well considered to be the appellant's interest in the goodwill and business in Doulton products in Canada. In my view this was, to use Lord Evershed's expression, "a capital asset of an enduring nature". It was one which the appellant had built up over the years in which it had the Doulton agency and which

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on the termination of the agency the appellant was obliged to relinquish. The payment received in respect of its loss was accordingly a capital receipt.

The appeal will therefore be allowed with costs and the assessment referred back to the Minister to be revised in accordance with these reasons.

Judgment accordingly.