Tourism Holdings Australia Pty Ltd v Commissioner of Taxes
[2007] NTCA 8

PARTIES:	TOURISM HOLDINGS AUSTRALIA PTY LTD v COMMISSIONER OF TAXES
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No AP 6 of 2007 (20321824)
DELIVERED:	14 November 2007
HEARING DATES:	16 October 2007
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & RILEY JJ
APPEAL FROM:	*Tourism Holdings Australia Pty Ltd v Commissioner of Taxes* [2007] NTSC 22

CATCHWORDS:

STAMP DUTY – agreement for sale of business operating in Australia – sale of goodwill – some goodwill overseas – valuation of goodwill – allocation of valuation of goodwill in Northern Territory – whether valuation correct – whether duty excessive – appeal dismissed

Statutes:
Stamp Duty Act, s 3, s 4, Schedule 1
Taxation (Administration) Act, s 4, s 4(b), s 9BA

Citations:

Referred to:

Briggs v Commissioner of Taxation (WA) (1987) 87 ATC 4,278
Federal Commissioner of Taxation v Murry (1998) 193 CLR 605
Geraghty v Minter (1979) 142 CLR 177
Hepples v Federal Commissioner of Taxation (1992) 173 CLR 492
Inland Revenue Commissioners v Muller & Co's Margarine Ltd [1901] AC 217
Tourism Holdings Australia Pty Ltd v Commissioner of Taxes (2005) 15 NTLR 80

REPRESENTATION:

Counsel:

Appellant:	D Russell QC with B O'Loughlin
Respondent:	J Durack SC with T Anderson

Solicitors:

Appellant:	Ward Keller Lawyers
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	mil0712
Number of pages:	27

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tourism Holdings Australia Pty Ltd v Commissioner of Taxes
[2007] NTCA 8
No. AP 6 of 2007 (20321824)

BETWEEN:

TOURISM HOLDINGS AUSTRALIA PTY LTD
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 14 November 2007)

Martin (BR) CJ:

[1] I agree that the appeal should be dismissed for the reasons given by Mildren and Riley JJ.

Mildren J:

[2] This is an appeal from a decision of single Judge who dismissed an appeal from an assessment of stamp duty made by the respondent on the sale of the goodwill of a business which was partly conducted in the Northern Territory. The appeal raises questions as to the proper interpretation to be given to s 9BA of the Taxation (Administration) Act (the Act) and whether

the method of apportionment of the value of goodwill for taxation purposes adopted by the Commissioner resulted in an excessive assessment of stamp duty.

Background facts

[3] The facts as found by the learned Judge are not in dispute. By an agreement in writing dated 31 August 1999, the vendors of the Britz International Motor Vehicle rental business sold the Australian assets of the business to the appellant (the asset sale agreement). The total consideration paid for the Australian assets was $102,973,606.

[4] The Australian assets are defined in the asset sale agreement to mean the Australian Owned Fleet of motor vehicles, Australia Hire Purchase Fleet of motor vehicles, the benefit of the Australian Fleet Lease Agreements, Australian Owned Plant and Equipment, Australian Hire Purchase Plant and Equipment, the benefit of the Australian Plant and Equipment Leases, Australian Intellectual Property, Australian Consumables, the benefit of the Australian Business Contracts, Australian Book Debts, the benefit of the Australian Property Leases and Australian goodwill. The Australian goodwill was defined in the asset sale agreement as “the goodwill of the Australian business” and includes “the exclusive right to carry on the Australian Business in Australia”. Under the terms of the asset sale agreement the vendors also agreed to transfer the Britz name to the purchasers.

[5] The asset sale agreement valued the Australian goodwill to be the equivalent of $46,469,744. That value was accepted by both parties. The respondent decided that the dutiable property assessable under the Act in the Territory amounted in value to $14,321,679 and included a proportion in value of the Australian goodwill valued at $14,033,862 that related to that part of the Australian business undertaking carried on in the Territory. The value of the goodwill apportioned to the Territory was arrived at by applying to the total value of the goodwill the proportion of Territory revenues of the motor vehicle rental business to the total Australian revenues of the business for the three financial years immediately preceding the sale of the business. The Territory revenues amounted to 30.20 per cent of the total revenues of the Australian business. Consequently, 30.20 per cent of the Australian goodwill amounted to $14,033,862, resulting in stamp duty in an amount of $773,375.50 on the asset sale agreement. The method of assessing goodwill on the revenues of the business in the Territory was used because the relevant profit figures were not provided by the appellant: *Briggs v Commissioner of Taxation (WA)* (1987) 87 ATC 4,278 at 4,292–4,294. The appellant does not complain that the method of calculating goodwill was based on revenues as opposed to profits. The complaint is that the apportionment does not correctly identify the value of the proportion of the goodwill that is dutiable under the Act because a large part of the Australian goodwill was situated overseas and, in particular, in Germany.

[6] The Australian business was established in 1982. It specialised in renting camping and recreational vehicles. The business was carried on in each State and in the Northern Territory. The head office was in Melbourne. There were branch offices in Darwin, Alice Springs, Cairns, Brisbane, Sydney, Hobart, Adelaide, Perth and Broome. The Australian business was oriented towards the overseas tourist market.

[7] Eight to ten people were employed in the head office in Melbourne. The head office housed the Australian business's world wide reservation centre. The employees at head office dealt with reservations and bookings, information technology, administration, management, operations, marketing, finance and communications.

[8] Customers of the Australian motor vehicle rental business were able to hire a range of mobile camping vehicles including two person campers, four wheel drives and self-contained six berth motor homes. Customers could collect the motor vehicles that they hired from any of the branches located at Darwin, Alice Springs, Cairns, Brisbane, Sydney, Melbourne, Hobart, Adelaide, Perth or Broome. The majority of customers collected the motor vehicle that they hired from either the Darwin or Alice Springs branch. Customers could either return the motor vehicle which they hired to the branch from which they hired the motor vehicle or they could pay an additional one way fee and return the motor vehicle which they hired to a different branch at the end of their journey. Approximately 50 per cent of motor vehicles rentals in Australia were one way hires and the majority of

motor vehicles that were hired for one way journeys would be returned by the customer to a branch in a different State or Territory from the branch where the motor vehicle was collected by the customer.

[9] The Australian business was part of the Britz International motor vehicle rental business which also carried on business in New Zealand and southern Africa. The owners and operators of the Britz International rental businesses that were carried on in New Zealand and southern Africa were the various companies that are listed as vendors in the asset sale agreement, other than those companies who are referred to as the Australian vendors.

[10] The majority of the Australian business's customers come from overseas. The following table lists the percentage of total bookings by customers from the major countries for the three years ended 30 June 1996, 1997 and 1998:

	1998 %	1997 %	1996 %
Germany	44.5	45.4	51.1
Australia	18.9	15.1	12.6
Switzerland	10.3	11.5	10.9
United Kingdom	5.4	5.2	4.7
Austria	4.0	4.2	4.3
Total	81.1	84.9	87.4

[11] Ninety per cent of the revenue of the Australian business is derived from overseas customers.

[12] Customers may be categorised as pre-book customers or walk-up customers. Both overseas and local customers are included in each of these two categories of customer. Pre-book customers consist of those customers who have pre-booked their travel either through a wholesaler or agent or by contacting the reservation centre in Melbourne prior to collecting a rented motor vehicle. Walk-up customers consist of those customers who negotiate the hire of a motor vehicle by simply walking into a branch of the Australian business in Australia and asking to hire a motor vehicle. Walk-up customers provide about 10 per cent of the revenue of the Australian business with the remaining 90 per cent or thereabouts of the revenue being provided by pre-book customers. Over the period from 1 July 1996 to 31 March 1999 approximately 88.4 per cent of the revenue of the Australian motor vehicle rental business was derived from pre-booked customers. Seventy-seven per cent of customers of the Australian business were pre-book customers from overseas.

[13] The following table shows the revenue of the business undertaking allocated according to whether the customers were pre-book or walk-up customers:

Booking Type	Booking Location	9 months to 31 March 1997 $'000	12 months to 31 March 1998 $'000	12 months to 31 March 1999 $'000	3 Period Total $'000	%
Walk-Up's	Adelaide	266	168	216	650	1.17
	Alice Springs	176	205	246	627	1.12
	Broome	25	26	84	135	0.24
	Brisbane	105	178	208	491	0.88
	Cairns	424	346	373	1,143	2.05
	Darwin	448	401	420	1,269	2.28
	Perth	310	323	343	976	1.75
	Sydney	368	256	420	1,044	1.87
	Melbourne	35	31	49	115	0.21
Total Walk-Up's	Total	2,157	1,934	2,359	6,450	11.57
Pre-Books						
Direct	Melbourne	1,728	2,080	3,300	7,108	12.75
Agent/Wholesaler	Melbourne	14,770	11,535	15,903	42,208	75.68
Total Pre-Books		16,498	13,615	19,203	49,316	88.43
Grand Total		18,655	15,549	21,562	55,766	100.00

[14] Approximately 30 to 40 per cent of the pre-bookings of rental motor vehicles were made by three wholesalers in Germany namely, Cafern, DER and Meiers. The last two companies have since merged. The wholesalers in Germany had a direct real time link with the Australian business's computerised reservation system. The wholesalers were permitted to sell "the products" of the Australian business to their customers at a price of their own choosing, thus determining their own margin. The wholesalers engaged in significant advertising and promotion of their own businesses and Britz International relied on them to direct their customers to the

Australian business and the other businesses in New Zealand and southern Africa.

[15] The Australian business established successful business relationships with the German wholesalers. There was a Britz Sales Manager or consultant based in Munich and another in Stuttgart. The two sales managers were totally committed to marketing Britz International products which were located in Australia, New Zealand and southern Africa. Not all of their time was spent conducting marketing activities on behalf of the Australian business. Both consultants had the job of promoting the Britz International business in Germany. They liaised with the wholesalers and attended various events that promoted tourism in Australia, New Zealand and southern Africa. They were subject to the directions of head office in Melbourne. In return for their work they were paid a monthly retainer. Both the consultants and the Managing Director of the Britz International business had a close personal relationship with the senior executives of the three German wholesalers. However, it was not proven that the relationships with the German wholesalers were exclusive relationships that precluded the wholesalers from referring customers to other motor vehicle rental companies. Nor was it established that the reason the German customers went to the wholesalers was because the wholesalers could introduce them to the Australian business.

[16] Employees of the Australian business travelled to Germany to install appropriate links in the German wholesalers' computers and to train their

staff so that the German wholesalers could use the FBS computer and reservation system that had been developed by Britz International. The computerised reservation system allowed a large number of travel agencies in Germany to perform real time enquiries about the availability and price of rental motor vehicles. Communication lags were largely eliminated by the computerised system. Smaller wholesalers and direct customers could use the computer reservation system by accessing the internet.

[17] The Australian business maintained no branches outside Australia at which any dealings with individual rental customers took place. The Australian business published a brochure that was available overseas. The brochure was entitled, “Britz Campervan Rentals and Tours Australia 1999/2000”. The brochure showed the various features and functions of the motor vehicles that were available for rent, the locations where the vehicles were available in Australia, prices and insurance details. It contained a booking form with the international fax number of the head office in Melbourne. The terms of the pre-booking arrangement were as follows. The customer was required to pay a deposit of $200 at the time of the booking in order to confirm the reservation. If a booking of a rental motor vehicle was cancelled by the customer within seven to 24 days of the motor vehicle collection date, the customer was required to pay a cancellation fee of 15 per cent of the total price of the hire of the motor vehicle. If a booking of a rental motor vehicle was cancelled by the customer within six days of the motor vehicle

collection date, the customer was required to pay a cancellation fee of 40 per cent of the total price of the hire of the motor vehicle.

[18] It is also possible to allocate the revenue of the Australian business according to the branch where the hired motor vehicle is collected by the customer. Of the total revenue of the Australian business, 30.2 per cent of revenue averaged over the three years prior to the execution of the asset sale agreement was generated by vehicle hire contracts signed by customers of the Australian business in the Darwin and Alice Springs branches. Branch revenues provide a good indication of the place where the business undertaking is carried on.

[19] The following table shows the distribution of revenue according to the branch where the hired vehicle is collected by the customer:

	1997 $'000	**%**	**1998 $'000**	**%**	**1999 $'000**	**%**	**3 Year Total $'000**	**%**
NT	6,609	32.01	4,902	30.81	6,358	28.12	17,869	30.20
SA	1,220	5.91	935	5.87	1,412	6.24	3,567	6.03
WA	3,056	14.80	2,514	15.80	3,594	15.89	9,164	15.49
QLD	4,313	20.89	3,382	21.26	4,647	20.55	12,342	20.86
NSW	1,658	8.03	1,152	7.24	1,897	8.39	4,707	7.95
VIC	3,789	18.36	3,026	19.02	4,705	20.81	11,520	19.47
TOTAL	20,645	100.00	15,911	100.00	22,613	100.00	59,169	100.00

[20] There are two branches of the Australian business in the Territory, one in Darwin and the other in Alice Springs. The Darwin branch included a vehicle holding yard for up to 200 motor vehicles. At the peak period of the tourist season a dozen detailers were employed at the Darwin depot.

Subcontractors were retained to do oil and grease changes, tyre changes and repairs. The vehicles were fitted out with appropriate living kits which included linen, towels and cooking utensils. There was a waiting room for customers with tea and coffee making facilities. There was storage for customers' luggage. A vehicle security deposit was paid by customers and there were staff available to provide the hire contract for the motor vehicle to customers and to advise customers about and sell insurance and other add-ons including motor cycles, fridges, baby seats and satellite beacons. The customer vehicle rental agreement was executed by customers at the branch at which they collected the rented motor vehicle. Customers were also supplied with maps and other tourist information and a Super Savers card or an Australian card which enabled customers to get a discount at various tourist facilities in the top end of the Territory. Customers were given directions to Ban Ban Springs Station which was only open to customers of the Australian business. The features and functionality of the rental vehicles were shown to the customers. Every effort was made to ensure that customers were happy with the camping vehicle that they hired. The quality of customer service was very important to the overall success of the Australian business. Although less than 10 per cent of total revenue, repeat business generated an annual revenue of slightly in excess of $1 million.

[21] The facilities of the branch in Alice Springs were not as extensive as the branch in Darwin. Six motor vehicle detailers were employed at the height

of the tourist season. Customers were provided with a toilet and shower, a lounge area to wait in and tourist information. Customers were also provided with the hire contract and insurance and other add-ons if requested. The branches were largely a mirror of each other. A high quality service was provided both in Darwin and Alice Springs.

[22] In total 30 people, who were employed by the Australian vendors, worked in the Darwin and Alice Springs branches of the Australian business. This figure represented approximately 34 per cent of the 88 employees who worked in the Australian business.

[23] Approximately two-thirds of purchases of "add-ons", including insurance packages, were purchased at the Australian branches of the business. Most customers of the Australian business purchased insurance at the Australian branch at which they collected the rented motor vehicle. The motor vehicles available for hire were insured, however, the customer was responsible for the payment of any excess. There was a strong incentive for customers to take out additional insurance. If they did not do so, they were required to leave a security deposit of up to $5,000 either in cash, travellers' cheques or by credit card. The purchase of insurance packages accounted for approximately 20 per cent of the total revenue of the Australian business.

[24] Before the learned Judge, senior counsel for the respondent accepted that a small part of the operations of the Australian business was carried on in Germany and that a small portion of the goodwill of the Australian business

would be locally situated in Germany. He said that it would be possible to maintain a passing off action in Germany. However, he submitted that the goodwill in Germany was related to the business undertaking that was carried on in the Northern Territory.

[25] The learned Judge found that the Australian vendors did carry on business in Europe and in particular in Germany and that the Australian business did have goodwill in Europe and in particular in Germany. His Honour found that the sources of the Australian goodwill included the Australian business's connections with German wholesalers and the provision of services at acceptable prices in the Territory; that part of the attractive force of the Australian business was the provision of services in the Territory; and that the Australian business would be less attractive to overseas customers if it did not provide a reliable and suitably priced service in the Territory.

Legislation

[26] Section 4 of the Stamp Duty Act imposes stamp duty on instruments included in the class of instruments specified in Schedule 1, which includes a "conveyance of dutiable property". Section 3 of the Stamp Duty Act provides that this Act is incorporated and shall be read as one with the Act.

[27] Section 4 of the Act, in the definition of "dutiable property" provides (inter alia):

> "the goodwill of a business undertaking carried on or to be carried on in the Territory, or in the Territory and elsewhere…"

[28] At the relevant time, s 9BA of the Act provided:

> "**9BA Apportionment**
>
> Where in the opinion of the Commissioner, dutiable property is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory, stamp duty shall be assessed in respect of that portion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory."

The appellant's submission before his Honour

[29] The thrust of the appellant's submission before his Honour was that the correct method of apportioning goodwill under s 9BA of the Act is to exclude the revenue of the Australian business that is derived both from customers who made pre-bookings elsewhere and from customers who "walked-up" to hire motor vehicles elsewhere than in the Territory. The apportionment of goodwill to the Territory must be based on an estimate of the amount of pre-booking revenue emanating from customers physically in the Territory together with the proportion of "walk-up" revenue that is generated by customers of the Australian business in the Territory.

[30] In support of this contention, the appellant submitted that the intention of the Legislature was that property which is situated outside the Territory is not subject to stamp duty because it may be taxed elsewhere. Thus only the goodwill of the business located in the Territory was dutiable. It was the appellant's submission that most of the goodwill of the Australian business was not located in the Territory and indeed a very large proportion of it was

located overseas. So far as s 9BA refers to dutiable property which is wholly or partially related to a business undertaking carried out in the Northern Territory is concerned, the submission was that this was intended to cover property which had no local situation, e.g. copyright, but did not extend to property related to property which was situated in the Territory. It was further submitted that the relationship with the wholesalers is Europe was a significant source of the goodwill of the Australian business and it should be valued where the attractive force operates, viz in Europe, because neither the source of the attractive source nor its operation was locally situated in the Territory.

The respondent's argument before the Judge

[31] His Honour does not set out the respondent's submissions, but I note that the respondent in providing reasons for the assessment said:

> "For the purposes of section 9BA of the Act, the Commissioner is of the opinion that the goodwill acquired by [the appellant] is partly related to a business undertaking in the Territory, and has assessed stamp duty in respect of that portion that is related to the THA business undertaking in the Territory… goodwill created by the international promotion of the services of a business undertaking carried on in the Territory falls into paragraph (b) of the definition of "dutiable property" in section 4(1) of the Act. Similarly, while superior management practices and an efficient reservation centre may be sources of goodwill, which may originate in Victorian headquarters, section 9BA of the Act operates to cause the goodwill from these sources to be assessable to the extent that it is related to the business undertaking in the Territory."

The reasoning of the learned Judge

[32] His Honour found that where dutiable property is property which is inherently related to a business undertaking, duty is to be imposed on "that portion of the dutiable property that is related to the business undertaking in the Territory. What must be assessed is the value of the legal right or privilege to carry on a portion of the Australian business in the Territory in substantially the same manner and by substantially the same means that have attracted custom to the business that is carried on in the Territory in the past including the right to make use of the established connections with the German wholesalers and other travel agents and any other attractive force of the business. Simply because the Australian business has goodwill that is situated in Europe and in particular in Germany it does not follow that it is not related to the business that is carried on [in] the Territory".

The appellant's argument before this Court

[33] The principal argument of the appellant is that, because the goodwill of the business has a situs in the Territory as well as elsewhere, on the true construction of s 9BA the duty had to be assessed by apportioning the goodwill in such a manner that stamp duty was assessed only in the goodwill situated in the Territory and not elsewhere. The learned Judge, having found that the Australian business had goodwill situated in Europe, failed to give any weight to the requirement that "… stamp duty should be assessed in respect of that portion of the dutiable property [goodwill] situated in the Territory…" whereas his Honour's reasons suggested an apportionment

based only on property which is “related to” the Territory business; in other words, his Honour failed to disregard the value of the goodwill situated overseas.

[34] In support of this argument the appellant contended that the hiring contracts in the majority of cases were made in Europe and, therefore, the revenue from those contracts should not be taken into account under either limb of s 9BA.

Respondent’s argument

[35] The respondent’s argument was that, where as here, the relevant business is carried on over a wide geographic area goodwill is an asset peculiarly appropriate for apportionment on the basis that it is “related to the business undertaking carried out in the Territory”.

[36] Alternatively, the respondent submitted that even if the appellant’s construction argument were correct, 30.20 per cent of the goodwill of the Australian business was also situated in the Territory. Further, the appellant had failed to show that the assessment was excessive. A finding that some goodwill of the Australian business was locally situated in Germany did not have that consequence because the assessment was based on the proportion of revenue from sales contracts executed in the Territory as the numerator of a fraction the denominator of which was the rental income of the entire business.

Conclusions

[37] In my opinion, it does not matter whether the goodwill of the business was partly situated in the Northern Territory or whether it was partly related to a business undertaking carried on in the Northern Territory. In either case, s 9BA required the Commissioner to assess the duty only in respect of that portion of the goodwill of the business which was situated in or which was related to the business undertaking in the Territory and in either case the exercise of calculating the assessment should have been the same. To the extent that there was evidence that the Australian business had goodwill, there was a finding that some portion of the goodwill existed in Germany, albeit no finding was made as to the value of that goodwill. On the facts of this case, there must also have been some goodwill located in Victoria and in each of the other States. Whilst it is true that goodwill is, by its nature, indiscerptible and inseverable from the business to which it is related, which in this case is the Australian business, this does not mean that it cannot be located in more than one place. In the modern world, large businesses carry on business in many parts of the world. Part of the attractive force, which brings in custom to a particular branch office, may be the reputation the business has gained overseas, interstate or locally.

[38] The method of calculation adopted by the Commissioner was based on the revenues generated in the Northern Territory expressed as a percentage of the Australian business' total revenues, which was calculated at 30.20 per cent. The appellant contends that the revenues from contracts made

overseas, whether through wholesalers overseas or from overseas customers who made direct bookings through the Melbourne office should have been identified and excluded from the calculation.

[39] It is not in contention that the Commissioner was wrong to base his calculations of the value of goodwill on the revenues generated by the business in the Northern Territory rather than based on profits so generated. The Commissioner was not provided with the profit figures by the appellant, so that method of calculation was simply not possible: *c.f. Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 542-543 per McHugh J; see also *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 624 [49]. The calculation made was based on "out revenues", which allocates the rental revenue for each vehicle according to the branch from which the hired vehicle is first collected by a customer and is accounted for on a cash basis. The contention of the appellant was that the calculation should have been made on the basis of "walk-up" revenues, i.e. the revenues generated from those customers who negotiate the hire of a motor vehicle by simply walking into a branch of the business in the Northern Territory and asking to hire a motor vehicle.

[40] The learned trial Judge accepted the opinion of the respondent's expert valuer, Mr Wayne Lonergan, that whilst it would be preferable to allocate goodwill based on the profits generated at each location, due to the fact that the value of goodwill is largely dependent on the profitability of the underlying business, in the absence of that information, the "out revenues"

generated in the Northern Territory were most likely to be the best estimate of the value of goodwill that is attributable to the Territory.

[41] In my opinion the appellant has not shown that the Commissioner's assessment if excessive. In *Murry's* case (supra) at 611 [12] Gaudron, McHugh, Gummow and Hayne JJ said:

> "As pointed out earlier in these reasons, s 160A defines "asset" to include "goodwill", but neither Pt IIIA nor the Act generally attempts to define goodwill. That is not surprising because, as Dawson J pointed our in this Court in *Hepples v Federal Commissioner of Taxation*, "'[g]oodwill' is notoriously difficult to define". One reason for this difficulty is that goodwill is really a quality or attribute derived from other assets of the business. Its existence depends upon proof that the business generates and is likely to continue to generate earnings from the use of the identifiable assets, locations, people, efficiencies, systems, processes and techniques of the business. As Dixon CJ, Williams, Fullagar and Kitto JJ pointed out in *Box v Federal Commissioner of Taxation*, "[g]oodwill includes whatever adds value to a business, and different businesses derive their value from different considerations". Another reason is that courts have been called on to define and identify goodwill in greatly differing contexts. In some cases, the nature of goodwill as property may be the focus of the legal inquiry. In other cases, the value of the goodwill of a business may be the focus of the inquiry. And in still other cases, identifying the sources or elements of goodwill may be the focus of the inquiry. It is unsurprising that in these varied situations courts have defined goodwill in ways that, although appropriate enough in one situation, are inadequate in other situations."

[42] In my opinion those observations are particularly pertinent in this case. A finding that there was some goodwill in Europe and in particular in Germany does not means that it inevitably follows that sales generated overseas should be the focus of the inquiry when it comes to identifying the value of the Australian goodwill nor for that matter, the value of the goodwill of the

Northern Territory business. On the facts of this case, the assets which generated the goodwill were all situated in the Northern Territory. The attractive force of the business consisted in the availability in the Northern Territory of suitable vehicles for hire at competitive prices and at suitable locations for collection, including the attractiveness of the add-ons available, as the learned Judge found. The facts relating to the sales to European customers show that, although many of the contracts were initially entered into overseas, the customers were required to, and did, enter into fresh customer vehicle rental agreements at the branches at which they collected the vehicles. It is true that prior to entering into the contracts in Australia, the overseas customers had contracted to pay cancellation fees and had also paid a small deposit, but, in my opinion, it does not follow that the whole of the revenue derived from overseas customers (or for that matter interstate customers) should be ignored for the purpose of the calculation of the goodwill of the Northern Territory business. Without the attractive force of the businesses located in the Territory there would never have been any contracts with overseas customers at all.

[43] Furthermore, as the learned Judge pointed out, sales made through wholesalers or agents are not the same as sales generated by a branch office overseas which sell directly to customers. The wholesalers and agents no doubt had goodwill attached to their businesses which may have been the driving force of customer contact overseas. There is no evidence that the wholesalers and agents exclusively marketed the Australian business.

Moreover, the Britz sales manager or consultants based in Munich and Stuttgart were not involved in any dealings with individual rental customers, but were committed to marketing Britz International products, including products located in New Zealand and southern Africa, as well as Australia. Clearly the promotion overseas of a product or service to be delivered and paid for in Australia suggests that the goodwill, at least for valuation purposes, was located in this country.

[44] If the basis of the valuation had been profits, it is pertinent to note that all of the profits were made in Australia. Moreover, it is not correct to say that, on the facts of this case, the attractive force or positive advantage which added value to the business was largely situated overseas. In my opinion, whilst the facts show that the Australian business had attracted overseas customers those facts do not warrant a finding that the attractive force which brought in the custom was located to any significant extent overseas. A different inference may have been drawn if the Australian business had conducted a business overseas which itself attracted custom to it, but that is not so in this case. There is no evidence that the Australian business had any tangible assets overseas and such intangible or human assets as the business engaged were not located overseas either, except to the extent that the Australian business may have had a reputation overseas and enjoyed the connection it had through Britz International with the overseas wholesalers and agents.

[45] In those circumstances I am unable to conclude that the appellant has shown, the burden being on it, that the assessment made by the Commissioner was excessive: *Tourism Holdings Australia Pty Ltd v Commissioner of Taxes* (2005) 15 NTLR 80 at 132 [140]. I would dismiss the appeal.

Riley J:

[46] I have read the judgment of Mildren J and agree this appeal should be dismissed. I add some observations of my own on one aspect of the matter.

[47] The appeal focuses upon the application of s 9BA of the Taxation (Administration) Act (NT). At the relevant time the section was in the following terms:

> "Where in the opinion of the Commissioner, dutiable property is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory, stamp duty shall be assessed in respect of that portion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory."

[48] The dutiable property of concern is the relevant goodwill of the Britz International Motor Vehicle Rental Business which was carried on in Australia and overseas. The Australian business (which was a part only of the international Britz business) was sold to Tourism Holdings Australia Pty Ltd. The issue was the extent to which the goodwill covered by the sale should be subject to duty in the Northern Territory. There is no dispute that goodwill is dutiable property for the purposes of the Act.

[49] The trial Judge found that the vendors carried on business in Australia and in Europe and that the Australian business had goodwill in Europe. That finding has not been challenged. The contention of the appellant is that the goodwill of the Australian business has a local *situs* and as a consequence the obligation on the part of the Commissioner was to determine what part of the goodwill was "situated in" the Northern Territory for the assessment of duty.

[50] When the matter was referred to the Supreme Court the learned trial Judge did not proceed by reference to the location of the goodwill but, rather, looked at the issue of what goodwill was "related to" the business undertaking carried on in the Territory. He noted that whilst the Australian business had goodwill which was situated in Europe that did not mean that the goodwill was not related to the business carried on in the Territory. He went on to conclude that it was appropriate to assess the value of the dutiable property "by applying to the total value of the Australian goodwill the proportion of Territory revenues of the motor vehicle rental business to the total Australian revenues of the business for the three financial years" immediately preceding sale.

[51] The appellant submitted that his Honour was in error in so doing. He was required to assess the portion of dutiable property "situated in the Territory". It was submitted that where dutiable property forming part of the assets of a business has *situs* then duty should be assessed by reference to the situation of the property.

[52] The appellant contended that s 9BA apportions dutiable property depending on the type of dutiable property the subject of apportionment. The section envisages two classes of property and creates two separate limbs to deal with those classes. It was submitted that s 9BA should not be construed so as to create two alternative bases of taxation with the Commissioner being empowered to select one to the exclusion of the other.

[53] The provision does not have that effect. Section 4 of the Stamp Duty Act imposes stamp duty upon conveyances of dutiable property. The term "dutiable property" is defined in s 4 of the Taxation (Administration) Act (NT) and, for present purposes, includes the goodwill of a business undertaking carried on or to be carried on in the Territory or in the Territory and elsewhere. Section 9BA of the Act is then a relieving provision in that it serves to relieve the taxpayer of the obligation to pay duty where the Commissioner forms the opinion that the dutiable property is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory. If either of those circumstances applies, the duty is to be assessed by reference to that portion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory rather than the whole of the dutiable property.

[54] In the present case, as the learned trial Judge found, it was appropriate to assess duty by reference to the portion of the dutiable property which is "related to" the business undertaking carried on in the Territory rather than by reference to the supposed location of the goodwill. The goodwill of the

Australian business was spread over a substantial geographic area. It related to a single business and was not spread amongst a number of businesses gathered under the one umbrella. Whilst it may be accepted that goodwill has "the attribute of locality": *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (at 224), this does not mean that it may be apportioned to different localities. As was observed in that case by Lord Macnaghten:

> "No doubt, where the reputation of a business is very widely spread or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise goodwill."

[55] The present case is not one such as was considered by the High Court in *Geraghty v Minter* (1979) 142 CLR 177 where Stephen J said (at 193):

> "Goodwill of a partnership business is an inseverable whole unless, of course, it consists in fact of a series of separate goodwills, each applicable to distinct areas in which the one business operates or to distinct business activities which the one business entity carries on. When sold, proceeds of goodwill may be divided up readily enough, but, because goodwill is 'the benefit and advantage of the good name, reputation and connection of a business' (*Inland Revenue Commissioner v Muller & Co's Margarine Ltd* (22) per Lord Macnaghten) it is inherently inseverable from the business to which it relates."

[56] Given that goodwill is something which attaches to a business and cannot be dealt with separately from the business: *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 (at 611), is "inherently inseparable from the business to which it relates" and cannot be separated from the business which created it, it will be situated where the business is carried on: *IRC v*

Muller & Co (at 235). The goodwill in this case is not susceptible to being apportioned among different locations. As the respondent submitted, the subject goodwill is peculiarly appropriate for apportionment by the second method provided for in s 9BA of the Act. In the circumstances of this case the appropriate approach was to look at the goodwill as a single entity and determine the portion of that single entity which is related to the business undertaking carried on in the Territory. This is what the trial Judge did. In my view he was not in error.
