

BETWEEN



COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA

Appellant

and

SHARPCAN PTY LTD

Respondent

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APPELLANT'S OUTLINE OF ORAL ARGUMENT

**PART I:**

1. The Appellant's Outline of Argument is in a form suitable for publication on the internet.

**PART II:**

**A. The Issues**

2. On 10 May 2010 Spazor Pty Ltd, as trustee of the Daylesford Royal Hotel Trust ("the Trustee") acquired 18 gaming machine entitlements ("the GMEs") that were created and allocated to it under the *Gambling Regulation Act 2003* (Vic) ("the Gambling Act") for the total sum of \$600,300.00 ("the GME Expenditure"). There are two issues. The first is whether the GME Expenditure was an outgoing of capital or of a capital nature or whether it was on revenue account and therefore an allowable deduction under section 8-1 of the *Income Tax Assessment Act 1997* (Cth) ("the ITAA97"). The second issue is whether, if the GME Expenditure was of capital or of a capital nature, it was deductible over 5 years under section 40-880 of the ITAA97. The second issue turns on whether the GME Expenditure was expenditure to which subsection 40-880(6) applied.

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**B. Material Facts**

3. The material facts are recited in pars [8] to [15] of the Appellant's Submissions: see also Tribunal Reasons [1], [2], [6]-[10]; Full Court Reasons [1]-[34], [44]-[76] per Greenwood ACJ, and [262]-[271] per Thawley J.

**C. First Issue – *Submission: The GME Expenditure was of capital or of a capital nature***

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4. The relevant legal principles are set out in *Sun Newspapers Limited v FCT* (1938) 61 CLR 337 at 359, 363; *Hallstroms v FCT* (1946) 72 CLR 634 at 647-8; *AusNet Transmission Group Pty Ltd v FCT* (2015) 255 CLR 439 at 451-3 [16]-[18], 454 [21], 456 [24], [25], 457 [27], 466 [46], 472-3 [66], 474-5 [73]-[75], [77], 476 [80].
5. The advantage sought and secured for the Trustee by the making of the GME Expenditure was the acquisition of the GMEs and the right to conduct lawful gaming which they conferred. The GMEs were held by the Trustee for the right to conduct lawful gaming at

the Royal Hotel for a period of 10 years commencing 16 August 2012, not for the purposes of turning over as items of trade. They were items of capital that formed part of the Trustee's "business entity, structure, or organization set up or established for the earning of profit" and their acquisition did not occur as part of the process by which the Trustee's business organisation operated "to obtain regular returns by means of regular outlay": *Sun Newspapers* case 61 CLR at 359. Accordingly, the GME Expenditure was of capital or of a capital nature: see Appellant's Submissions [21] to [23].

6. In deciding that the GME Expenditure was on revenue account, the majority of the Full Court made three principal and related errors. First, the majority of the Full Court failed properly to address and identify the nature of the advantage which the trustee from a practical and business point of view sought to achieve by the expenditure. The majority ought to have found that the advantage which the Trustee sought to achieve by the expenditure was to acquire the GMEs and to secure the statutory rights which the GMEs conferred, in particular the right to conduct lawful gaming on gaming machines, for the period of 10 years. See Full Court Reasons [143]-[152], cf [31]-[34], [57]-[62], [169], [242] per Greenwood ACJ; cf [280] per Thawley J.
  7. The second principal error made by the majority of the Full Court was to conflate the manner in which the Trustee expected to fund the expenditure with the process of determining what was the advantage sought to be achieved by the Trustee in incurring the expenditure: Full Court Reasons [143]-[150] per Greenwood ACJ; cf [294] per Thawley J. See *AusNet Transmission Group Pty Ltd v FCT* (2015) 255 CLR 439 at 451 [17], 456 [24]; *Colonial Mutual Life Assurance Society Limited v FCT* (1953) 89 CLR 428 at 447-8, 454-5; *British Insulated and Helsby Cables Limited v Atherton* [1926] AC 205 at 212-4, 216-8; *G.P. International Pipecoaters Pty Ltd v FCT* (1990) 170 CLR 124 at 137.
  8. The third principal error made by the majority of the Full Court was to rely upon *BP Australia Ltd v FCT* (1965) 112 CLR 386: Full Court Reasons [154]-[179]. The reasoning in the *BP* case does not assist the Respondent and the facts are distinguishable: see 112 CLR at 397-8, 402, 405; Full Court Reasons [296]-[299] per Thawley J.
  9. Finally, the three further considerations set out by Greenwood ACJ at Full Court Reasons [185]-[191] do not support the conclusion that the GME Expenditure was on revenue account: Appellant's Submissions [32]-[38].
- D. Second Issue – Submission: The GME Expenditure was not incurred by the Trustee to preserve (but not enhance) the value of goodwill within the meaning of subsection 40-880(6).**

10. The GME Expenditure was incurred by the Trustee to acquire the GMEs which it required in order to conduct gaming on 18 gaming machines after 16 August 2012. The GMEs were separate and distinct assets from the goodwill of the Trustee’s business. They were not a source of goodwill of the business. They authorised gaming on 18 gaming machines. The value from the use of the GMEs to derive income from the conduct of gaming was separate and distinct from the value of goodwill. The GME Expenditure was incurred to acquire the GMEs. It was not to preserve (but not enhance) the value of goodwill: cf Full Court Reasons [335]-[342] per Thawley J.
11. In holding to the contrary, the majority of the Full Court erred. There were two material errors. First, the majority misconstrued the meaning of goodwill. The majority wrongly equated goodwill with the trading income and profits of the business and with the concept of the business as a going concern: Full Court Reasons [187], [242], [254]; see *FCT v Murry* (1998) 193 CLR 605 at 608-9 [4], 611-15 [12]-[22], 619 [36], 625 [51], 625 [53], [57], 629-30 [67], [68]; *Commissioner of State Revenue v Placer Dome Inc* (2018) 93 ALJR 65 at 81 [83], [84], 83 [91], 84 [97]-[100], 85-6 [107], 90 [142].
12. The second material error was to fail to consider correctly whether there was a purpose of the trustee “to preserve (but not enhance)”. The clear intention of the Trustee was to acquire a right of significant value, namely the right to conduct gaming at the Royal Hotel for a period of 10 years on and after 16 August 2016, a right which prior to and but for the GME Expenditure the Trustee did not have. That is not an intention on the part of the Trustee “to preserve (but not enhance)”: Full Court Reasons [242]-[248] per Greenwood ACJ; cf [340]-[341] per Thawley J; Appellant’s Reply [11]; *Box v FCT* (1952) 86 CLR 387 at 394.

***Submission - The value to the Trustee of the GMEs was not solely attributable to the effect they had on goodwill within the meaning of subsection 40-880(6).***

13. The GMEs had a value to the trustee separate and independent from any effect they may have had on goodwill. They conferred on the Trustee the right to conduct gaming for reward, a right which when exercised by the Trustee resulted in the derivation of substantial income from gaming, and they were transferable. The value of the GMEs therefore was not “solely attributable to the effect that [they have] on goodwill.”
14. The finding by the majority of the Full Court to the contrary involved a misconception as to the meaning of goodwill. The majority wrongly equated the value of goodwill with the use value of the assets of the business and with the value of the business as a going concern: Full Court Reasons [242], [254] per Greenwood ACJ; cf [343] per Thawley J.

Dated: 9 August 2019

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G. J. DAVIES