IN THE HIGH COURT OF AUSTRALIA **Nos S238 and 239 of 2010**
SYDNEY OFFICE OF THE REGISTRY

S238/2010	**S239/2010**
AMERICAN EXPRESS WHOLESALE CURRENCY SERVICES PTY LTD	**AMERICAN EXPRESS INTERNATIONAL INC**
Applicant	**Applicant**
COMMISSIONER OF TAXATION	**COMMISSIONER OF TAXATION**
Respondent	**Respondent**

RESPONDENT'S SUBMISSIONS

Part I – Publication

1. The following submission is in a form suitable for publication on the internet.

Part II – Issues on the Appeal

2. The ultimate issue on the appeal is whether the Applicants have established that the assessments of "net amounts" made by the Respondent are excessive (*Taxation Administration Act* 1953, s 14ZZO(b)(i)).

3. The immediate issue, arising from application of the taxing statute (*A New Tax System (Goods and Services Tax Act) 1999*, "the GST Act," s 11-30) to the facts of the present appeal, is the extent to which the Applicants were entitled to a partial input tax credit in respect of unidentified and unallocated acquisitions (ordinarily comprising the overheads) of the business of American Express International Inc ("Amex"). Resolution of that issue turns on the interpretation, and application to the facts of that business, of an agreed formula (*100 x (1-revenue derived from input taxed supplies / total revenue*)) which had been adopted by the parties as a proxy for the statutory criterion "the extent to which the creditable acquisition is for a creditable purpose, expressed as a percentage" in s 11-30(3) of the GST Act.

4. The amounts in contest were amounts received by Amex as default fees (called by Amex "liquidated damages" and "late payment fees") from the holders of charge and credit cards who were late in making payment to Amex. The Applicants' contentions, disputed by the Respondent, are that

Filed on behalf of the Respondent by:

Australian Government Solicitor
Level 42, MLC Centre, 19 Martin Place
Sydney NSW 2000
DX444 Sydney

Filed on 1 April 2011

Contact: Catherine Leslie
File ref: 07018923
Telephone: 02 9581 7481
Facsimile: 02 9581 7732
E-mail: Catherine.leslie@ags.gov.au

(a) in construing the agreed proxy formula, the word "revenue" where first appearing, but not where second appearing, is confined in its meaning to what comprises "consideration" as defined in the GST Act;

(b) for the purpose of the formula, the default fees were revenue (included in the denominator),[1] but not consideration derived from input taxed supplies (and thus not included in the numerator); and

(c) all supplies made by Amex to the holders of charge and credit cards (other than extended credit at interest) were made in or under a "payment system" within the meaning of Reg 40-5.12 of the GST Regulations.

10 5. The procedural issue raised by the Applicants' notice of appeal is whether in exercise of its discretion the Full Court should, by reason of his acquiescence in the error in the proceedings at first instance, have precluded the Respondent from disputing on appeal the Applicants' contention in para 4(a) above.

Part III – Section 78B

6. The Respondent certifies that he considers that no notice is required to be given under s 78B of the Judiciary Act.

Part IV – Material Facts

7. The Respondent agrees with the statements of fact at paragraphs [8-15] of the Applicants' submissions. The inferences drawn in paragraph [16][2] are not contested
20 by the Respondent, although the selective citation of the Respondent's ruling (which was not put in evidence) omits his ruling that cardholders are not participants in a payment system to whom taxable supplies of or under a payment system are made.[3]

8. Factual contentions and assumptions elsewhere in the Applicants' submissions have no foundation in the evidence and are not accepted:

(a) that the Amex system is a "closed loop" or "three party" system;[4]

---

1 The Applicants' submissions at [71-72] appear to dispute that the default fees were revenue, but the Applicants included their amount in the denominator for the purpose of applying the formula.

2 Those in the second and subsequent sentences. No evidence was led by the Applicants on the matters stated in paragraph [16]. The Respondent does not accept the factual assertion in the first sentence.

3 GSTR 2002/2 Appendix 2 item A100, "in relation to charge, credit and debit card transactions": "Account holders are not (in that capacity) participants in a payment system"

4 Applicants' submissions at [8], [38]. Material not in evidence but in the Application Book suggests otherwise: during the period in contest, "Two major banks ... entered into agreements with American Express to issue American Express cards," AB xx Payment Systems Board Annual Report 2004 at p 13.

(b) that "the system is provided to cardholders predominantly so that fees can be earned by Amex from merchants"[5]

(c) that "the default fees relate to the making of taxable supplies to merchants"[6] – on the evidence, the default fees relate to the terms of the contracts, and to the dealings, between Amex and its cardholders, and are calculated by reference to the historical cost to Amex of defaults (including the income lost by reason of the default and the costs of recovery);[7]

(d) that the GST for which input tax credits are claimed is "GST imbedded in acquisitions in connection with recovering amounts from cardholders"[8] - the input tax credits in issue relate to all general overheads;

(e) that the notion that "revenue" in the numerator of the agreed formula meant "consideration" had its origin in the Respondent's audit report;[9] the notion had its origin in the Applicants' returns the subject of that report.

Part V – Statutory material

9. In addition to the legislative materials set out in Annexure A to the Applicants' submission, the further provisions set out in the annexure hereto are relevant.

Part VI – Argument for the Respondent

10. For the reasons which follow the Respondent submits –

(i) By the contracts governing the issue of the cards to the cardholders Amex made to the cardholders a supply of rights under those contracts which was a financial supply;

Also in the period, third parties (eg, the Law Society of NSW) entered into agreements with Amex to issue third party branded cards. There is no evidence as to the extent to which any Amex "payment system" extended to these arrangements; had the terms and operation of a "payment system" been put in issue at first instance, it may be expected that there would have been an evidentiary investigation of the arrangements.

5 Applicants' submissions [16]

6 Applicants' submissions [25]; a variation of this contention, equally unfounded in evidence, is that "the costs of recovering amounts from cardholders are in truth part of the cost of earning merchant commissions," Applicants' submissions [26]

7 Applicants' submissions [14], affidavit of Hirokawa (24 August 2007) at [33-39]

8 Applicants' submissions at [23], [24], [42], [61]

9 Applicants' submissions [62], [63], [66].

(ii) The default fees paid to Amex under those contracts comprised "revenue derived" from that supply, and so revenue derived from an input taxed financial supply, for the purpose of the agreed formula;

(iii) So far as it is relevant (the Respondent says it is not), the default fees were "consideration" for the financial supply in (i) within the meaning of s 9-15 of the GST Act;

(iv) The supply of rights under the issue contracts was not a supply of, or of an interest in or under, a payment system;

(v) The Applicants' claim to increase the s 11-30(3) extent of creditable purpose adopted in assessing the amount of input tax credits to which they were entitled was not made out and the Respondent's assessments are not shown to be excessive;

(vi) The Full Court's decision to allow the Respondent to present the argument in para (ii) above on his appeal to that Court should not be disturbed.

(a) Factual context

11. By the assessments in contest in this appeal the Respondent reduced the amount of input tax credits allowed to the Applicants in respect of Amex's acquisitions of overheads. The relevant criterion of entitlement to input tax credits is *extent of creditable purpose*, viz, "the extent to which the *creditable acquisition is for a *creditable purpose, expressed as a percentage of the total purpose of the acquisition" (s 11-30(3)).

12. The parties agreed[10] to adopt, as a measure of the "extent," the formula *100 x (1-(revenue derived from input taxed supplies / total revenue))*, thereby taking the ratio between the respective shares of revenue derived from input taxed supplies and from other sources as a proxy for the extent of creditable purpose.

13. The particular amount of revenue in contest (viz, as to whether it was "derived from input taxed supplies") is the amount received by Amex in consequence of the holders of charge and credit cards defaulting in compliance with their obligations under contracts incorporating the terms of issue of the cards.[11] The amounts, described as "liquidated damages" and "late payment fees," were payable under the terms of those

---

10 The power in subs 11-30(5) to "determine, in writing, one or more ways in which to work out, for the purpose of subsection (3), the extent to which a creditable acquisition is for a creditable purpose" was not exercised in the present case.

11 Interest paid by credit card holders who elect to defer payment is not included in the "default fees" in issue.

contracts, and the revenue comprising the "liquidated damages" and "late payment fee" amounts was derived from the making of supplies under those contracts.

14. By those contracts, and in consideration inter alia of annual cardholder fees paid under the contracts, Amex conferred on and supplied to the cardholders from whom the default fees were received, rights (i) to possession of the cards, (ii) to tender the cards to merchants in satisfaction of the price of goods and services, and (iii) to make payment of the price amount to Amex not immediately upon tender of the card but at a date up to 55 days later.

(b) Financial supply: Reg 40-5.09

15. The Respondent submits that the supply by Amex to the cardholders of the rights identified in paragraph 14 was a financial supply.

16. Materially for the purposes of this appeal, a supply is a financial supply if (inter alia) it is "the provision [or] acquisition … for consideration …" of "an interest in or under … a debt, credit arrangement or right to credit."[12] An "interest" is "anything that is recognised at law or in equity as property in any form."[13]

17. All members of the Full Court concluded,[14] and the Applicants do not now contest,[15] that the combination of rights (ii) and (iii) in paragraph 14 above is a "credit arrangement or right to credit." The Respondent submits that the Full Court was right so to conclude. The Applicants' submissions concerning "credit" are misdirected: it is immaterial that there is no "deferral" from the due date of an obligation to pay, but sufficient that the due date is later than the date on which the cardholder by tender of the card satisfies the price of goods or services;[16] and it is immaterial whether the

---

12 GST Act s 40-5(2); GST Regulations Reg 40-5.8, 40-5.9(1), (3)

13 Reg 40-5.02; the Regulation gives as an example of an interest "a debt or a right to credit."

14 (2010) 187 FCR 398, 410 [52] (Dowsett J), 434-5 [149-155] (Kenny and Middleton JJ); see also Sch 7 Part 2 Item 2, "opening, keeping, operating, maintaining and closing charge and credit card facilities" as an example of a "credit arrangement of right to credit" in Reg 40-5.09 item 2, and *Fitz-Gibbon v Inspector General in Bankruptcy* (2001) 180 ALR 475 at 479 [15]

15 The Applicants' submissions at [49] advance an argument that there was no deferral of an obligation to pay the statement amount on the due date, and that therefore there was no "credit arrangement" or provision of credit. This argument does not meet the submission of the Respondent, and the conclusion of the Full Court, that there was a "credit arrangement or right to credit" comprised in the contract under which the cardholders could tender the card as the price of goods or services and not be required to disburse that price (to Amex) until the due date of the statement amount.

16 Applicants' submissions at [49]. The question is not, as it was in *Prime Wheat Association v CC of SD* (1997) 42 NSWLR 505, whether there is a loan of money or a forbearance to demand money owing, nor as it was in *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 whether there is a loan of money, nor as it was in *American Express International Inc v C of SR* (2004) 10 VR 145 whether there was a "repayment" to the merchant or a "continuing credit agreement." In the last-mentioned case, Amex did not dispute that it was a "credit provider,' but to the contrary relied on the Tribunal finding ([2002] VCAT 376, [4-5]) that it was: 10 VR 145, 150 [8-10].

default fees are "consideration" for the supply of the credit arrangement, but sufficient that they are revenue derived from the financial supply of the credit arrangement.[17]

18. Nor do the Applicants dispute that the identified rights were conferred on, and so supplied to, the cardholders. The Applicants' submission is that those rights were not "property rights."[18] This submission misstates the statutory criterion: an interest is "*anything* that is *recognised* at law or in equity as property *in any form*."[19]

19. "Property" is a broad and potentially ambiguous term,[20] the content of which must as a matter of statutory interpretation be divined from the context in which it appears. The concept is not "monolithic;"[21] in a testamentary context it is "the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have,"[22] in other contexts it may be spoken of as a "bundle of rights" or as "a legally endorsed concentration of power over things and resources,"[23] and may extend to a bare right of action.[24] The concept extends to rights which are protected at law or in equity, whether or not they are transferable: "It may be said categorically that alienability is not an indispensable attribute of a right of property according to the general sense which the word 'property' bears in the law."[25] A right "cognizable at law"[26] is property; in the task of characterisation, "how the law

---

17 Applicants' submissions at [50]. The cardholder annual fee is consideration for the financial supply. Moreover, if it were a relevant question, the default fees were "consideration" (as defined) for the financial supply, for the reasons at [25] below.

18 See for example at [53], "property rights," and [57], "proprietary rights." The statutory criterion is incompletely set out at Applicants' submission [53] but not thereafter addressed.

19 Reg 40-5.02, emphasis added

20 *Yanner v Eaton* (1999) 201 CLR 351, 388 [85]; *Commonwealth v Yarmirr* (2001) 208 CLR 1, 38 [13]

21 *Yanner v Eaton* (1999) 201 CLR 351, 366 [19]

22 *Jones v Skinner* (1835) 5 LJ Ch (NS) 87 at 90 per Lord Langdale MR, cited in *Yanner v Eaton* (1999) 201 CLR 351, 366 [19]

23 *Telstra Corp Ltd v Commonwealth* (2008) 234 CLR 210, 230 [44], dealing with s 51(xxxi) of the Constitution and citing *Yanner v Eaton* (1999) 201 CLR 351, 365–7 [17]–[20], dealing with the expression "property in" a thing.

24 *Wurridjal v Commonwealth of Australia* (2009) 237 CLR 309, 361 [90], *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297, 308, 312, *Commonwealth v Mewett* (1997) 191 CLR 471, 534; *National Trustees Executors and Agency Co of Australasia Ltd v FC of T* (1954) 91 CLR 540, 583

25 *National Trustees Executors and Agency Co of Australasia Ltd v FC of T* (1954) 91 CLR 540, 583.2 per Kitto J, adopted by Dixon CJ at 557.5, Fullagar J at 568.7; cf *Yanner v Eaton* (1999) 201 CLR 351, 388 [85] per Gummow J

26 *Thomson's Case (Perpetual Executors & Trustees Association of Australia Ltd. v FC of T* (1948) 77 CLR 1, 26-27

protects an interest is not so important as the recognition which the law gives to it as something which the law intends to be enjoyed."[27]

20. The contractual rights conferred on the cardholders by the terms of issue of the cards, including in particular the rights identified in paragraph 14 above, are "cognisable at law" and are "recognised at law and in equity as property in any form."

21. The authorities relied on by the Applicants turn on issues and statutory criteria remote from the present and provide little or no guidance to the construction of the GST Regulations. When liability to tax is conditioned on a conveyance or sale of property,[28] or rights turn on whether property is "unalienated,"[29] the concept of "property" must necessarily involve alienability. When the contest is as to priority of rights in realty subject to registered title, the right for which priority is claimed must be "proprietary," a right in the land, and not merely personal.[30] When the question is whether there has been an "acquisition of property" from a claimant, to be "acquired" the property must be capable of transfer from the claimant by the acquirer.[31] In contrast, where the issue does not turn on a transfer, or on competing equitable estates,[32] but on what of value is or was owned by a testator, or on the nature of presently enjoyable rights,[33] alienability and the ability to recover alienated property from third parties are not essential attributes of the concept. The observations of Lord Wilberforce in *Gartside v IRC*[34] are in point: the "word has to do duty in several quite

---

27 *National Trustees Executors and Agency Co of Australasia Ltd v FC of T*(1954) 91 CLR 540, 557.9 per Dixon CJ

28 In *C of SD v Yeend* (1929) 43 CLR 235 the liability in issue was to duty on a conveyance or sale. In like vein, *Jack v Smail* (1905) 2 CLR 684 the issue was whether a grocer's licence attached to particular premises was "property which passed to the trustee" in bankruptcy, and being personal and non-transferable it was held not to be such property.

29 In *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 the question was whether the holder of a grazing licence had such rights in the land that the land, or an interest in it, had been "alienated" to the grazier.

30 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 concerned priorities between a mortgagee and the mortgagor's wife, who had only personal rights against the husband

31 *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 concerned a claim to invoke the constitutional protection in s 51(xxxi) constraining "acquisition of property."

32 It is such issues which are the subject of the chapters ("Equitable Estates and Interests," and "Assignments in Equity") in Meagher Heydon & Leeming, *Equity Doctrines and Remedies*, which are cited by the Applicants.

33 *Yanner v Eaton* (1999) 201 CLR 351, concerning "property in" fauna.

34 [1968] AC 553 at 617, quoting Viscount Radcliffe, delivering the Board's judgment in *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 at 719, and adopted by this Court in *CPT Custodian Ltd v C of SR* (2005) 224 CLR 98, 114 [31]. Viscount Radcliffe went on to add (at 712) that "the terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words 'interest' and 'property'. Thus propositions are advanced or rebutted by the employment of terms that have not in themselves a common basis of definition"

different legal contexts to express rights of very different characters and ... to transfer a meaning from one context to another may breed confusion."

22. The statutory context in which the present question arises does not narrow, but rather broadens, the scope of what is designated by "property." Financial supplies are a subset of what is supplied (s 40-1). The breadth of "supply" – "any form of supply whatsoever" – does not limit the concept of "financial supply," and the language of the regulations is also broad: an interest may be provided or acquired as well as disposed of.[35] The "interest" which is the subject matter of the relevant provision or acquisition may be "anything" which is "recognised at law or in equity" as property. The concept invoked is one of identifying that which is protected by law or equity; personal rights, including those which are personal to the holder and (before termination) those which are terminable at will, may be "property" for this purpose.

23. The range of interests which may be provided, acquired or disposed of as a "financial supply" extend far beyond "proprietary" rights, to an "account," a "credit arrangement," a "right to credit," and "credit" under a hire purchase agreement.[36] The qualities argued by the Applicants to deny the character of "property" to the rights conferred on cardholders under the issue contract would apply equally to these interests, so that on the Applicants' argument these items would have no content and no work to do. Similarly, most of the examples in Schedule 7 to the Regulations are of things which are not "proprietary rights" in the sense contended for by the Applicants, and so could not be examples of a financial supply.[37] In particular, Items 2 and 3 in Schedule 7 Part 2, "opening ... operating ... charge and credit card accounts" and "supply of credit cards," could not on the Applicants' argument be a financial supply. Such a construction should not be adopted.[38]

24. A particular amount of revenue may be "derived" from more than one supply.[39] Here, on the presentation and acceptance of the card in satisfaction of the price of goods or services, a debt due from the cardholder was acquired by Amex. The acquisition of that debt is deemed to comprise a financial supply by Amex[40] within the definition,[41]

---

35 Regulations 40-5.03 to 40-5.05 extend, but do not limit, the concepts dealt with: *FC of T v St Huberts Island Pty Ltd (in liq)* (1978) 138 CLR 210, 216

36 Reg 40-5.09 items 1, 2, and 8

37 By way of example, Schedule 7 Part 1 items 1, 3, 6 to 11, 12, 16, Part 2 items 1 to 4. While the examples cannot prevail over the proper construction of the regulations, they serve to illuminate that construction and to indicate the legislative intention.

38 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [71].

39 *FC of T v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342, 352 [28]; see footnote 50 below

40 By Regulation 40-5.09(1) "The ... *acquisition* ... of an interest mentioned in subregulation (3)," including "an interest in or under ... 2 a debt," is a financial supply. In *AXA Asia Pacific Holdings Ltd v FC of T* (2008) 173 FCR 500 such supplies were described by use of the expression "acquisition supply." The underlying rationale is explained by Hill J in *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553 at 59 [19].

and the revenue comprised in the default fees is derived also from the acquisition of that debt (when it is not paid on time).[42]

(c) Revenue from an input taxed supply

25. The Applicants maintain the argument that the default fees were not "consideration," as defined, for a "right to be in default" or any default by cardholders,[43] or for "the right to present the card."[44] It is not argued, nor did the majority consider, that there was a supply of a default or a right to default. It is argued that the default fees were revenue derived from, and so far as it might be relevant "consideration," within the definition in s 9-15, in respect of the supply of the rights identified in [14] above. No more is required by the definition than that there be a "payment ... in connection with a supply of anything." While it takes its content from its context, the phrase "in connection with" is one of "wide import."[45] Here the connection is more than merely close: the obligation to pay the default fees is imposed by the terms of the agreement effecting the supply of rights which comprises the financial supply.

26. The default fees are in any event "revenue" derived from the supply of rights: they are paid to replenish the profits of Amex so far as they are diminished by the delinquency of the cardholder, and are calculated to do so.[46] As a replenishment of

---

41 Both Emmett J (see at 73 ATR 182 [42-3]) and Dowsett J (see at 187 FCR 398, 409 [46]) adverted to the acquisition of the debt due by the cardholder as a financial supply, but as one excluded from the definition by the exclusion of interests in or under a "payment system." The majority in the Full Court did not consider it necessary to rely on the acquisition of the debt as a relevant financial supply, having accepted the Commissioner's submission that the rights identified at [14] above were the subject of a financial supply.

42 The Respondent accepts that if, contrary to his submission, the whole course of dealing between the cardholder and Amex comprises a payment system, and is in consequence a taxable supply, the acquisition supply of the debt arising on acceptance of the card as satisfaction of the price payable to a merchant is also a taxable supply.

43 Applicants' submissions [71]

44 Applicants' submissions [47]. This formulation of the financial supply in issue is a truncation of the specification of the financial supply in the majority judgment (and the Respondent's submissions) and is not responsive to that formulation; the Applicants' argument slides between the restricted formulation and a more accurate account (see for example [2], [27], [44] and [47(b)]

45 *Brown and Others v Rezitis and Others* (1970) 127 CLR 157, 165, where it was held that there was an insufficiently "close connection" between certain expenses and a contract for work; cf *R v Watson, ex p Australian Workers Union* (1972) 128 CLR 77, 95 where Gibbs J said that "in their ordinary meaning and in the context of the rule they require that there should be a relationship between" the employment and the relevant operations, but found it absent on the facts. In *Collector of Customs v Cliffs Robe River Iron Associates* (1985) 7 FCR 271, 275 Bowen CJ, Morling and Neaves JJ said "The meaning of the word 'connection' is both wide and imprecise. One of its common meanings is 'relation between things one of which is bound up with, or involved, in another'."

46 Applicants' submissions [14]; affidavit of Hirokawa (24 August 2007) at [33-39]

profits, and as a receipt in the ordinary course of the business of Amex,[47] they partake of the character of revenue.[48]

27. The default fees, both as consideration and as revenue, were derived from the supply of the rights identified in paragraph 14 above, which was an input taxed supply. While the precipitating event resulting in default fees becoming payable was a failure of the cardholder to pay the debt due to Amex on time, the cardholder's obligation to pay and Amex's right to receive the default fees were imposed and conferred by the agreement (the terms of issue) the making of which comprised the input taxed financial supply made by Amex to the cardholder, that is, the supply of the right to present the card in satisfaction of the purchase price of goods or services without having to outlay money in payment to Amex until a later date. The revenue comprising the default fees was derived from the supply of that right.

28. That revenue was also derived from the "acquisition supply" being the creation of the debt due to Amex when the card is presented: it was that debt upon non-payment of which the "liquidated damages" or "late payment fee"[49] accrued. The revenue being the default fees was derived from the creation of that debt although payable upon the event of default.

29. It is not to the point that the default fees accrued in consequence also of the cardholder's default, and so may be said also to be derived from that default. The question arising under the statute (s 11-15(2)(a)), as worked out pursuant to s 11-30 under the agreed formula, is whether the revenue was derived from an input taxed supply. That question is not answered by examining whether or not it was (also) derived from some other event or source.[50]

(d) Payment System Revenue

30. The relevance of the provisions of the Regulations dealing with "payment systems" is that an amount that is revenue derived from supply of, or of an interest in or under, a

---

47 *F C of T v The Myer Emporium Ltd* (1982) 150 CLR 355, 366; cf *FC of T v GKN Kwikform Services Pty Ltd* (1991) 21 ATR 1532, 1534, 1538, where amounts payable on default of returning hired goods were held to be income of the hirer, notwithstanding that they compensated for the loss of capital assets; *Memorex Pty Ltd v FC of T* (1987) 77 ALR 299, to the same effect.

48 *Burmah Steamship Co v IRC* (1930) 16 TC 67; *Commr of Taxes v Phillips* (1936) 55 CLR 144, 157; *Heavy Minerals Ltd v FC of T* (1966) 115 CLR 512; *FC of T v Wade* (1951) 84 CLR 105, 112; *Californian Oil Products v FC of T* (1934) 52 CLR 28, 46; *Williamson v Commissioner for Railways* (1959) 76 WN (NSW) 648, 650, 653

49 Cl 14 of the charge card conditions and cl 29 of the credit card conditions

50 *FC of T v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342, 352 [28]: "The circumstance that the [revenue] had various characteristics does not mean that the taxpayer may fix upon such one or more of these characteristics as it selects to demonstrate that there was no [input taxed] supply. It is sufficient for the Commissioner's case that the presence of one or more of these characteristics satisfies the criterion ..."

payment system, is by force of Reg 40-5.12 revenue derived not from an input taxed supply but from a taxable supply, and is excluded from the numerator of the formula adopted by the parties.

31. The Respondent accepts that there is a payment system operating among Amex, the merchants and their respective banks. For the purpose of their argument in relation to input tax credits and the agreed formula,[51] the Applicants contend that the payment system extends further, to embrace all dealings between Amex and cardholders: not merely payments, but also the agreements under which the cards are issued and the use of the cards.[52] That argument should be rejected. Whatever the boundaries of the payment system operated by Amex – something which cannot be discerned from the evidence led,[53] which was in no respect directed to any reliance upon Reg 40-5.12[54] – they do not extend to embrace the cardholders or their use of the cards. Neither the supply identified at [14] above nor the acquisition of the debt arising on an accepted tender of the card is a supply of, or of an interest in or under, a payment system.

32. Although the Applicants nominate as "the relevant supply by Amex" simply "the right to present the card,"[55] with the right to pay at a later date described rather in terms only of an obligation to pay, they go on to argue that "Amex supplies cardholders and merchants with access to a payment system to facilitate the purchase of goods and services,"[56] that the system "exists to facilitate the cardholder's purchase"[57] and that by virtue of their entry into the contracts embodied in the terms of issue the cardholders

---

51 But in contradiction to their treatment of amounts received from cardholders, see further [37] below

52 Applicants' submissions at [37], [41(c)], [41(f)], [43]

53 The paucity of evidence was noted both (at 187 FCR 414 [65-6]) by Dowsett J, who made some heroic assumptions and inferences in support of his conclusion, and (at 187 FCR 437 [160]) by the majority, who proceeded upon an assumption, for the purpose of argument, that there was a payment system.

54 At first instance, reliance on the existence of a payment system was intentionally excluded from the objection (AB xx) and the Applicants' pleadings (AB xx) as being unnecessary (Full Ct transcript at 84.33), and any question of a "payment system" was referred to in the Applicants' written submissions only in passing (at [32-3]) in disputing the Respondent's submission that there was a "credit arrangement." There was no reference in affidavit or oral evidence to a payment system, by that or any other name. The cardholder and merchant agreements were tendered to establish the circumstances in which default fees became payable. No reference to any "system" was made in evidence or submissions. In particular there was no evidence of the operation of any system: none of any payments being made, either to or by Amex; no evidence of the mechanisms by which payment was or might have been made, and in particular no evidence of the operation of the "Direct Credit Payment Service" to which merchants might obtain access (Merchants Agreement Sect IV cl 1, AB xx), or of the "electronic banking system accessible to us" in which the merchant's bank must "participate," or of the "procedures established by us from time to time" (ibid cl 4, AB xx).

55 See for example the first sentences of [1] and of [27].

56 Applicants' submissions at [28(b)]

57 Applicants' submissions at [41(c)(i)]

are participants in and are supplied a payment system which facilitates the circulation of money from the cardholders to the merchants.[58]

33. In support of this argument the Applicants rely on the decision in *Visa International Service Association v Reserve Bank of Australia.*[59] For the reasons given by the majority below,[60] that decision, given on different legislation directed to a different purpose, does not support the conclusion that Amex provided to the cardholders a payment system or an interest in such a system.

34. The structure of the Regulations assumes that a "payment system" – a "funds *transfer* system that *facilitates* the *circulation* of money, including any *procedures* that relate to the system" – is supplied to "participants," those who "*participate in the system* in accordance with the rules governing the *operations* of the system." The multitudinous cardholders[61] are not participants in a funds transfer system; the rights conferred on them facilitate their purchases, but not the circulation of money in a funds transfer system. The holders of charge and credit cards, like the holders of current and savings accounts with banks, are supplied with rights to undertake transactions which result in funds being transferred through a payment system, but they are not thereby supplied with the payment system. If supply of the right to undertake such transactions – the making available of the card or bank account – were supply to the holder of a payment system, all bank accounts would be part of a "payment system," all transactions on the accounts would be supplies of an interest in or under a payment system, and all bank and card transactions would be excluded from the category of financial supplies. Not only would this leave no scope for the operation of item 1 in Reg 40-5.09(3) or of sub-regs 40-5.09(4) and (4A),[62] it would make almost all of the examples in Parts 1 and 2 of Schedule 7 meaningless.[63]

35. When regard is had to the overall structure and purpose of Division 40 of the Regulations, and to the role of financial supplies in the scheme of the GST,[64] the conclusion to be drawn is that the cardholders are supplied by Amex neither with a

---

58 Applicant's submissions at [41(f)]

59 (2003) 131 FCR 300

60 (2010) 187 FCR 398, 437-444 [160-182], especially at [170-174].

61 There is no direct evidence of the number of cardholders, but the level of card fees (ABxx, over $50m annually), the absence of card fees for credit cards (ABxx) and the evidence that credit cards outnumber charge cards by a factor of 12 (ABxx [29]) together suggest a very large number.

62 Regulation 40-5.09(4A) was inserted by SLI 29 0f 2009, after the subject period.

63 While the examples do not prevail over the terms of the regulations (Acts Interpretation Act s 15AD, note 2 to reg 40-5.11), neither are they to be ignored in construing the regulations.

64 That role is lucidly explained in the judgment of Hill J in *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553. The policy underlying the scheme of input taxing financial supplies is also set out in the Explanatory Statement to A New Tax System (Goods and Services Tax) Regulations 1999, Attachment E.

payment system nor with an interest in or under a payment system. The Respondent respectfully submits that the decision of the majority in this regard should be affirmed.

36. The Applicants' criticism at paragraphs [41-43] of their submissions, of the reasoning of the majority on the question whether the exclusion from financial supplies of supplies of, in or under payment systems extended to the supplies by Amex to cardholders, is directed to matters of detail or semantics rather than to the substantive issues. Thus for example the criticism rests significantly on the premise that the majority wrongly confined their attention to supplies of "interests" in or under a payment system;[65] but it was not submitted to the Full Court that the supply was one of "a payment system," and it is inherently implausible to suppose that any cardholder was supplied with the entire "system," whatever its limits. What was supplied to an individual cardholder was at most an interest under such a system, and the majority so approached the issue. Similarly, the majority did not suggest that the examples in the Schedules dictated the analysis of the regulations, but rather that the examples illuminated that analysis.

37. The Applicants' criticism of the majority judgment,[66] to the effect that the majority in dealing with "the same set of contractual rights" reasoned "inconsistently" in treating them as an "interest" for the purposes of Reg 40-5.09 but not for those of Reg 40-5.12, not only does an injustice to the reasoning in the judgment but also points up a fundamental problem in the Applicants' case. The Applicants contend that what is supplied to the cardholders is a right of "access to a payment system to facilitate the purchase of goods and services," by provision of the "right to present the card" on the terms in the contract embodied in the terms of issue, that it is by the provision of the card on those terms that the supply is made, and that the supply so identified is a taxable supply, being excluded from input taxed supplies by the operation of Reg 40-5.12.[67] If this contention is correct, it must also follow (as the majority pointed out[68]) that the consideration given for the supply of the card and of the rights under the cardholder contract, namely the annual membership fee, was consideration for a taxable supply, and an amount taken into the calculation of each of the value of taxable supplies directed by s 9-75, the amount of GST payable under s 9-70, and the "net amount" under s 17-5.

---

65 Applicants' submissions at [41(a), (c)(iii), (d)]

66 Applicants' submissions at [41(c)]

67 Repeatedly the Applicants contend that the claimed "payment system" comprises or includes "the same set of contractual rights" as that identified by the majority, and the Respondent, as the rights the subject of the financial supply giving rise to the default fees, namely, the rights conferred on cardholders by the terms of issue: see for example Applicants' submissions at [41(c)], [43]

66 (2010) 187 FCR 398, 445 [184]

38. It is the s 17-5 "net amount" for the relevant periods which was assessed by the Respondent and objected to by the Applicants, and it is the excessiveness of the net amount which is the ultimate issue in these proceedings: to secure an order setting aside the Respondent's objection decision,[69] the Applicants must show that the net amount assessed was excessive.[70]

39. The "net amount" is the surplus of GST over input tax credits: s 17-5(1). In their returns, the Applicants calculated the net amount by treating the annual membership fees as consideration for financial supplies and so as not entering into the calculation of GST. If the annual fees were properly included in taxable value for the years in contest,[71] the GST attributable to them would exceed the amount of input tax credits attributable to treatment of the default fees as taxable for the purpose of the agreed formula,[72] and it would necessarily follow that the assessment was not shown to be excessive. The Applicants cannot, on resolution of the one "matter" before the court, simultaneously press upon the court both the argument that the supply of rights under the terms of issue is not a financial but a taxable supply for the purpose of quantifying one integer (input tax credits) in the calculation of that surplus, and the directly contrary argument that the supply of those rights is not a taxable but a financial supply for the purpose of quantifying the other integer (GST) in the calculation. On the Applicants' argument, the assessment is not excessive and the appeal must fail.[73]

---

69 The right of appeal is against the correctness of the Respondent's objection decision, Taxation Administration Act 1953 s 14ZZ(a)(ii), cf s 14ZZP

70 Taxation Administration Act s 14ZZO

71 The Respondent submits that there is no supply of a payment system or any interest therein to cardholders, with the consequence that annual fees are not consideration for a taxable supply, and has so ruled publicly. The Applicants' argument is to the contrary: that a payment system is supplied to cardholders. The inevitable consequence of the Applicants' argument is that the annual fees are consideration for a taxable supply, and are taken into the value of taxable supplies.

72 Membership fees exceeded $50 million annually; GST on the amount of the fees exceeded $5 million annually, AB xx. In the 24 month period assessed, the exclusion of default fees from revenue from input taxed supplies in the calculation of input tax credits would reduce the net amount assessed by $7.7 million, AB xx, that is, by less than the GST attributable to the membership annual fees being included in the calculation of GST. The assessment cannot, on the evidence, be shown to be excessive.

73 Ultimately the only issue on the appeal is whether the assessments issued to the Applicants were excessive. In presenting their argument that the assessments were excessive, the Applicants cannot both approbate (in relation to their claim for input tax credits) and reprobate (in relation to the GST integer in the calculation of the net amount) the proposition that the supply of rights under the agreement for issue of cards is a taxable supply as a supply of a payment system. The Respondent contends, and has publicly ruled, that the supply to cardholders is not a taxable supply, such that annual fees and default fees are neither included in calculating the taxable value of supplies, nor excluded from the numerator of the agreed formula. Consistently with that ruling the Applicants would under s 37 of the Taxation Administration Act be relieved of any obligation to pay additional GST in respect of the annual fees if they had relied on the ruling, and the Respondent's practice is not to include in net amounts as assessed an amount which the taxpayer has excluded in reliance on a public ruling. The assessment issued in this case was consistent with that practice, which has now been given explicit statutory force (s 37 was replaced by s 105-60 in the First Schedule to the Taxation Administration Act by Act 73 of 2006, which in turn was replaced by s 357-60 in that Schedule by Act 74 of 2010)

(e) The Applicants' case

40. The Applicants' positive case is nowhere clearly articulated; the submissions are largely an attack on the majority judgment below. The substance of the argument appears[74] to be that

(a) the only relevant supply is that "to cardholders and merchants [of] access to a payment system," in the case of cardholders by supply of "cards to cardholders which enable cardholders to purchase goods and services in accordance with the terms and conditions of the card";[75]

(b) that supply was a taxable supply (Reg 40-5.12) and so neither the consideration for nor revenue derived from the supply entered into the numerator of the agreed formula;

(c) in any event there was no financial supply for which the default fees were consideration as defined or from which Amex derived revenue comprising the default fees, for the reasons in the succeeding subparagraphs;

(d) the rights supplied to those to whom cards were issued on the terms of issue were not an "interest" because they were not property recognised at law or in equity;

(e) because the holders became liable to pay only on receipt of a statement, there was no "credit arrangement or right to credit" except in the case of credit card holders who elected to defer payment and pay interest.

A variety of tangential contentions on collateral but materially irrelevant questions are also raised in the course of the criticism of the majority reasons.

41. Responding seriatum to the steps so identified in the Applicants' argument, the Respondent, on the grounds set out above, submits –

(a) there were two relevant financial supplies, being those identified in paragraph 14 above (supply of rights under the issue terms) and in paragraph 24 above ("acquisition supply" of a debt)

(b) neither of those supplies was a supply to the cardholder of, or an interest in or under, a payment system, for the reasons in paragraphs 32 to 35 above; but if it were, the appeal must be dismissed, for the reasons in paragraphs 37 to 39.

---

74 This formulation is not that of the Applicants.

75 Applicants' submissions at [28(b)], [28(a)]

(c) the relevant question is not whether the default fees were "consideration" for a financial supply, but whether they were revenue derived from a financial supply, which they were for the reasons in paragraphs 25 to 29 above, and the majority was correct so to hold.[76] But in any event the default fees were "consideration" for the rights conferred by the terms of issue, for the reasons at [25] above, and further for the reasons given by Dowsett J.[77]

(d) the rights supplied under the terms of issue were an "interest" in a credit arrangement or right to credit: they were something recognised as property at law or in equity, for the reasons at paragraphs 18 to 23 above. The acquisition of the debt was a deemed supply of the debt.

(e) the relevant credit is not deferral of payment beyond the due date, and the Applicants' submissions directed to such deferral are misdirected. The credit is the entitlement to pay at a later date (to Amex) the amount of the price of goods and services acquired by tender of the card.[78]

42. As to other incidental submissions made by the Applicants, the Respondent submits

(a) the argument that the default fees were "in substance" part of a mixed supply should be rejected. Such a supply is, for GST purposes, a supply of the goods or services: as a "practical business matter"[79] that is its character. If the vendor also contracts that the purchaser may defer payment in consideration of a late payment fee or interest, the deferral (but not the supply of goods or services) is a financial supply and the interest or charge is the consideration for that supply.[80]

(b) the definition of "money" in sec 195-1 of the GST Act[81] is not material to the present issue; payment by way of credit card is relevant to the assessment of "price" in sec 9-75, but in the context of Reg 40-5.12 it is not "payment by way of credit card" tendered by a cardholder to a merchant to satisfy the purchase price that is the subject of a "funds transfer system that facilitates the circulation of money" – it is not the credit card voucher that is "circulated."

---

76 (2010) 187 FCR 398, 427-8 [123-127]

77 (2010) 187 FCR 398, 411 [53]

78 See paragraph 17 above

79 See the authorities cited and adopted in *Travelex Ltd v FC of T* (2009) 178 FCR 434, 443 [46], and referred to by this Court on appeal, *Travelex Ltd v FC of T* (2010) 270 ALR 253, 259 [45]

80 Albeit in a different statutory context, this is the conclusion of the European Court of Justice in *Muys' en De Winter's Bouw-en Aannemingsbedrijf BV v Staatssecretaris van Financiën* (Case C-281/91) [1997] STC 665 (http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61991J0281)

81 Applicants' submissions at [34]

(f) Leave to amend

43. The argument the subject of the leave to amend was arguably open on the grounds of appeal to the Full Court,[82] but the argument that "consideration" was not a relevant integer in the agreed formula had not been advanced at first instance and leave to amend was sought to avoid any dispute about ambiguity and to raise squarely the issue of availability of the argument. The majority granted leave on the ground that in their view it was expedient and in the interests of justice to do so, as there was "no reason to perpetuate an error of construction that affects the proper application" of the Act, the result of correctly applying the formula was "a fair and reasonable application of s 11-30(3)," [83] the new argument raised only questions of construction, not of fact,[84] and the alternative bases of apportionment postulated but not explained by the Applicants were not shown to be a fair and reasonable ascertainment[85] of the "extent" of creditable purpose directed by that subsection to be determined.

44. The majority's exercise of the discretion to amend was a course open to them, involved no error of law, and should not be disturbed.

45. The Applicants' submissions that the grant of leave was unjust rest largely on the unfounded proposition that the construction of "revenue" in the agreed formula as "consideration" was first put forward by the Respondent's auditors in the course of a compliance review; a submission to that effect was accepted by Dowsett J.[86] The admitted evidence is to the contrary: the amendment to limit the numerator to "consideration" was made by Amex before the Respondent's audit began.[87] The Compliance Activity Report, if admitted, would have led to no different conclusion.[88]

46. The Applicants chose to calculate their allowable input tax credits, both originally and again in the calculation in contest in the proceedings, on the basis of an apportionment using the fraction in which "revenue derived from input taxed supplies" was the

---

82 Grounds 2 and 3, ABxx

83 (2010) 187 FCR 398, 448 [197]

84 (2010) 187 FCR 398, 446 [189]

85 Language derived from the analysis by the High Court in *Ronpibon Tin NL* v *FC of T* (1949) 78 CLR 47 of the similarly expressed criterion of apportionment in s 51 of the Income Tax Assessment Act 1936; see (2010) 187 FCR 398, 446 [192]

86 Applicants' submissions at [62], [66], cf [63-4], [68]; Dowsett J at (2010) 187 FCR 398, 417 [73]

87 The substitution of consideration for revenue was made by the Applicants in the preparation of the Business Activity Statements (AB xx – xx) in the manner described in the Respondent's objection report at pp 4-5, ABxx.

86 The Compliance Activity Report was not tendered in evidence and was not put before the Full Court pursuant to any leave granted to the Applicants to supplement the evidence admitted; it was, without leave, attached to submissions which the Applicants had been given leave to make on the admitted evidence. Had the report been tendered to establish the proposition advanced by the Applicants, that proposition would have been challenged by the tender of evidence to rebut the inference advanced.

critical variable. The case as presented to the Commissioner on audit, as formulated in the Respondents' pleadings and as argued at first instance both orally and in writing was directed to the application of that formula. The substitute argument which the Respondent presented on appeal went solely to the construction of that formula. There was not and could not have been any suggestion that different or additional evidence would have been directed to that argument had it been presented at first instance.

47. The Applicants' submission is rather that they would have abandoned the basis of calculation adopted in their BAS, and all of the evidence led in respect of it, and sought to advance an entirely different contention, not in support of the input tax credits claimed as a result of the calculation but in support of some different and unquantifiable amount of input tax credit. An application so to alter the foundation of the Applicants' case would not have been acceded to at the hearing:

(a) the case sought to be presented would not be within the Applicants' grounds of objection,[89] to which the Applicants on appeal against the objection decision are limited;[90] while the Court has power to relieve against that limit,[91] it would not do so where

(b) the proposed substitute grounds of objection do not go to the amount by which the assessment is increased, which are the subject of the objection and which are the subject of the objection decision which is the "matter" before the Court for judicial review;[92]

(c) the "first alternative methodology" put forward is not materially different from that adopted by the Applicants: it depends on applying the same formula to the parts of the costs "allocated" to each of "transactors" and "revolvers," and involves the same questions as were the subject of the proceedings in the Federal Court, and there would be no utility in an amendment which substituted a contest on the "first alternative methodology" for the contest on the objection as lodged;

(d) the "second alternative basis" involves an undescribed and undefined "allocation" to "activities" but no means of thereby calculating the percentage directed by the definition of "extent of creditable purpose." As s 11-30 only

---

89 AB210-3, AB350-4

90 Taxation Administration Act 1953, sec 14ZZO(a), "the appellant is, unless the Court otherwise orders, limited to the grounds stated in the taxation objection to which the decision relates."

91 Taxation Administration Act s 14ZZO(a); *Lighthouse Philatelics Pty Ltd v FC of T* (1991) 32 FCR 148, 156, "but the taxpayer has no automatic right to such an order," *FC of T v Jackson* (1990) 27 FCR 1, 18

92 *FC of T v Jackson* (1990) 27 FCR 1, 19.4

applies to "partly creditable" acquisitions, it may be inferred that all possible "allocation" to taxable or out of scope supplies had already been made; and the inverted formula proposed raises the same issue in relation to the default fees as is now in contest.

48. It is notable that the evidence which the Applicants argue would be available to be led in support of the alternative methodologies does not include any evidence as to the amounts of input tax credits which might be apportioned, what acquisitions any credits related to, what revenues or outgoings the evidence of the suggested experts would relate to or how many card holders, in what categories and with what balances and turnovers, there were in the years in issue. Whether "by any possibility" evidence to implement the "alternative methodologies" could have been led at trial is not disclosed by the Applicants' submissions.[93]

49. The acquisitions in respect of which a partial input tax credit is sought were each acquisitions which were only partly for a creditable purpose, and partly related to making supplies which were input taxed. The Act requires a calculation of the "extent of creditable purpose" for each acquisition in respect of which a partial credit is claimed.

50. The course which the Applicants claim would have been adopted at first instance is not one which would have satisfied the requirement of the statute and established an entitlement to further input tax credits in the amount in dispute. It is instead the adoption of one of two alternative substitute proxy methodologies, neither of which is the ascertainment in respect of each acquisition of the extent of creditable purpose of that acquisition. While the adoption of an appropriate substitute proxy[94] might be a course acquiesced in by the Respondent in the interests of practical administration, it is not one upon which the Applicants could rely in appellate proceedings unless it has been the subject of a written determination made under s 11-30(5). No such determination was made in the present case, and it was not open to the Federal Court to make, or to direct the Respondent to make, such a determination. Nor could the Applicants invoke any obligation imposed on the Respondent to acquiesce in the adoption of the substitute methodology. In consequence, the alternative case which it is claimed would have been adopted by the Applicants, had it been argued by the Respondent at first instance that the numerator in the agreed formula denoted revenue

---

93 Possibly for similar reasons, no evidence was led below of any acquisitions, or of any amounts received from cardholders (on any account, from holders of any category, or at all). The dispute was framed solely in terms of construction of the formula and of the statute.

94 Having regard to the paucity of detail of the suggested substitute methodologies advanced in the Applicants' submissions, it cannot be said whether either of them is one which, as a matter of practical administration, would be accepted by the Respondent in this particular case as an appropriate proxy for the statutory test, as being a "fair and reasonable" apportionment of acquisitions between creditable and non-creditable acquisitions.

rather than "consideration," is one which was not open to them, and no prejudice comprising deprivation of the opportunity to advance such a case was suffered.

51. Moreover, had leave to advance the argument that the default fees were "revenue derived from" input taxed supplies been refused, the only difference in the arguments on the appeal would have been to confine the question to (the incorrect question) whether the default fees were "consideration" (in addition to any other consideration, and in addition to any other character they may have had[95]) derived from the supply of the rights conferred on the cardholders under the terms of issue; an argument on which the Respondent would have succeeded for the reasons at paragraph 41(c) above.

1 April 2011

A H Slater QC
Tel 02 9230 3232
Fax 02 9232 8435
aslater@aslater.com

R L Seiden
Tel 02 9230 3220
rseiden@wentworthchambers.com.au

J Hyde Page
Tel 9230 3214
jhydepage@wentworthchambers.com.au

Counsel for the Respondent

95 *FC of T v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342, 352 [28]; see footnote 50 above

Annexure to the Respondent's Submissions

Additional statutory provisions:

A New Tax System (Goods and Services Tax) Act 1999: Sections 9-15, 9-70, 9-75, 17-5, 27-5, 31-8, 33-3, 48-60

Taxation Administration Act: sections 14ZZ, 14ZZP; in Schedule 1, section 357-60

10

Taxation Administration Act (now repealed): sections 37; in Schedule 1, section 105-60

IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

Nos S238 and 239 of 2010

S238/2010
AMERICAN EXPRESS WHOLESALE CURRENCY SERVICES PTY LTD
Applicant

COMMISSIONER OF TAXATION
Respondent

S239/2010
AMERICAN EXPRESS INTERNATIONAL INC
Applicant

COMMISSIONER OF TAXATION
Respondent

FURTHER ANNEXURE TO RESPONDENT'S SUBMISSIONS

INDEX

Filed on behalf of the Respondent by:

Australian Government Solicitor
Level 42, MLC Centre, 19 Martin Place
Sydney NSW 2000
DX444 Sydney

Filed on: 4 April 2004

Contact: Catherine Leslie
File ref: 07018923
Telephone: 02 9581 7481
Facsimile: 02 9581 7732
E-mail: Catherine.leslie@ags.gov.au

A New Tax System (Goods and Services Tax) Act 1999

Act No. 55 of 1999 as amended

9-15 Consideration

(1) ***Consideration*** includes:

(a) any payment, or any act or forbearance, in connection with a supply of anything; and

(b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.

(2) It does not matter whether the payment, act or forbearance was voluntary, or whether it was by the *recipient of the supply.

(2A) It does not matter:

(a) whether the payment, act or forbearance was in compliance with an order of a court, or of a tribunal or other body that has the power to make orders; or

(b) whether the payment, act or forbearance was in compliance with a settlement relating to proceedings before a court, or before a tribunal or other body that has the power to make orders.

(2B) For the avoidance of doubt, the fact that the supplier is an entity of which the *recipient of the supply is a member, or that the supplier is an entity that only makes supplies to its members, does not prevent the payment, act or forbearance from being consideration.

(3) However:

(a) if a right or option to acquire a thing is granted, then:

(i) the consideration for the supply of the thing on the exercise of the right or option is limited to any additional consideration provided either for the supply or in connection with the exercise of the right or option; or

(ii) if there is no such additional consideration—there is no consideration for the supply; and

(b) making a gift to a non-profit body is not the provision of consideration; and

(c) a payment made by a *government related entity to another government related entity is not the provision of consideration if the payment is specifically covered by an appropriation under an *Australian law.

9-70 The amount of GST on taxable supplies

The amount of GST on a *taxable supply is 10% of the *value of the taxable supply.

9-75 The value of taxable supplies

(1) The ***value*** of a *taxable supply is as follows:

$$\text{Price} \times \frac{10}{11}$$

where:

price is the sum of:

(a) so far as the *consideration for the supply is consideration expressed as an amount of *money—the amount (without any discount for the amount of GST (if any) payable on the supply); and

(b) so far as the consideration is not consideration expressed as an amount of money—the *GST inclusive market value of that consideration.

Example: You make a taxable supply by selling a car for $22,000 in the course of carrying on an enterprise.

The value of the supply is:

$$\$22{,}000 \times \frac{10}{11} = \$20{,}000$$

The GST on the supply is therefore $2,000 (i.e. 10% of $20,000).

(2) However, if the taxable supply is of a *luxury car, the ***value*** of the taxable supply is as follows:

$$\text{Luxury car tax value} \times \frac{10}{11}$$

where:

luxury car tax value has the meaning given by section 5-20 of the *A New Tax System (Luxury Car Tax) Act 1999*.

(3) In working out under subsection (1) the value of a *taxable supply made in a *tax period, being a supply that is a *fringe benefit, the price is taken to be the sum of:

(a) to the extent that, apart from this subsection, paragraph (a) of the definition of ***price*** in subsection (1) would be applicable:

(i) if the fringe benefit is a car fringe benefit—so much of the amount that would be worked out under that paragraph as represented the *recipient's payment made in that period; or

(ii) if the fringe benefit is a benefit other than a car fringe benefit—so much of the amount that would be worked out under that paragraph as represented the *recipients contribution made in that period; and

(b) to the extent that, apart from this subsection, paragraph (b) of the definition of ***price*** in subsection (1) would be applicable:

(i) if the fringe benefit is a car fringe benefit—so much of the amount that would be worked out under that paragraph as represented the recipient's payment made in that period; or

(ii) if the fringe benefit is a benefit other than a car fringe benefit—so much of the amount that would be worked out under that paragraph as represented the recipients contribution made in that period.

17-5 Net amounts

(1) The ***net amount*** for a tax period applying to you is worked out using the following formula:

GST - Input tax credits

where:

GST is the sum of all of the GST for which you are liable on the *taxable supplies that are attributable to the tax period.

input tax credits is the sum of all of the input tax credits to which you are entitled for the *creditable acquisitions and *creditable importations that are attributable to the tax period.

For the basic rules on what is attributable to a particular period, see Division 29.

(2) However, the *net amount for the tax period may be increased or decreased if you have any *adjustments for the tax period.

27-5 General rule—3 month tax periods

The ***tax periods*** that apply to you are each period of 3 months ending on 31 March, 30 June, 30 September or 31 December in any year, except to the extent that:

(a) an election is in force under section 27-10; or

(b) the Commissioner determines otherwise under this Division.

Note: Several provisions in Chapter 4 provide for different tax periods. In particular, Division 151 provides for annual tax periods.

31-8 When GST returns must be given—quarterly tax periods

(1) If a tax period applying to you is a *quarterly tax period, you must give your *GST return for the tax period to the Commissioner:

(a) as provided in the following table; or

(b) within such further period as the Commissioner allows.

When quarterly GST returns must be given

Item	If this day falls within the quarterly tax period ...	Give the GST return to the Commissioner on or before this day:
1	1 September	the following 28 October
2	1 December	the following 28 February
3	1 March	the following 28 April
4	1 June	the following 28 July

(2) A tax period is a ***quarterly tax period*** if:

(a) it is a period of 3 months; or

(b) it would be a period of 3 months but for the application of section 27-30 or 27-35.

Note: Under section 27-30, a tax period can be determined to take account of changes in tax periods. Under section 27-35, the start or finish of a 3 month tax period can vary by up to 7 days from the start or finish of a normal quarter.

33-3 When payments of net amounts must be made—quarterly tax periods

If:

(a) the *net amount for a tax period applying to you is greater than zero; and

(b) the tax period is a *quarterly tax period;

you must pay the net amount to the Commissioner as follows:

When quarterly GST payments must be made

Item	If this day falls within the quarterly tax period ...	Pay the net amount to the Commissioner on or before this day:
1	1 September	the following 28 October
2	1 December	the following 28 February
3	1 March	the following 28 April
4	1 June	the following 28 July

48-60 GST returns

(1) If you are a *member of a *GST group during the whole of a tax period, you are not required to give to the Commissioner a *GST return for that tax period, unless you are the *representative member of the group during that period.

Note: If you were not a member of a GST group during the whole of a tax period, you are still obliged to give a GST return for the tax period, and (beeause of section 48-51) your net amount for the tax period will take into account your liabilities and entitlements relating to the one or more parts of the tax period during which you were not a member.

(2) This section has effect despite section 31-5 (which is about who must give GST returns).

Taxation Administration Act 1953

Act No. 1 of 1953 as amended

In force as at July 2004 (repealed by Act No. 73 of 2006)

---

37 Reliance on Commissioner's interpretation of an indirect tax law

37 (1) [**Application of section**] This section applies to you if:

(a) the Commissioner alters a previous ruling that applied to you; and

(b) relying on the previous ruling, you have unpaid a net amount or an amount of indirect tax, or the Commissioner has overpaid an amount under section 35-5 of the GST Act, in respect of one or more:

(i) taxable supplies or taxable importations; or

(ii) taxable dealings; or

(iii) taxable supplies of luxury cars or taxable importations of luxury cars; or

(iv) creditable acquisitions or creditable importations;

that happened before the alteration.

Taxation Administration Act 1953

Act No. 1 of 1953 as amended

Inserted by Act No. 73 of 2006, s 3 and Sch 5 item 41, with effect from 1 July 2006
Repealed by Act No. 74 of 2010

105-60 Reliance on Commissioner's interpretation of an indirect tax law (other than a fuel tax law)

(1) This section applies to you if:

(a) the Commissioner alters a previous *indirect tax ruling that applied to you; and

(b) relying on the previous ruling, you have underpaid a*net amount or an amount of *indirect tax, or the Commissioner has overpaid an amount under section 35-5 of the *GST Act, in respect of one or more:

(i) *taxable supplies or *taxable importations; or

(ii) *wine taxable dealings; or

(iii) *taxable supplies of luxury cars or*taxable importations of luxury cars; or

(iv) *creditable acquisitions or*creditable importations;

That happened before the alteration.

Note: For reliance on the Commissioner's interpretation of a fuel tax law, see Division 357.

(2) Unless the Commissioner is satisfied that you contributed to the giving, or continuing in force, of the earlier ruling by a misstatement or by suppressing a material fact:

(a) the underpaid *net amount or *indirect tax ceases to be payable; or

(b) the overpaid amount under section 35-5 of the *GST Act is taken to have been payable in full; from when the previous ruling was made.

(3) In deciding whether an *indirect tax ruling applies to you, or whether a ruling has been altered:

(a) a *private indirect tax ruling applies only to the entity to whom it was given; and

(b) so far as a private indirect tax ruling conflicts with an earlier *public indirect tax ruling, the private indirect tax ruling prevails; and

(c) so far as a public indirect tax ruling conflicts with an earlier private indirect tax ruling, the public indirect tax ruling prevails; and

(d) an alteration that a later indirect tax ruling makes to an earlier indirect tax ruling is disregarded so far as the alteration results from a change in the law that came into operation after the earlier indirect tax ruling was given.

Taxation Administration Act 1953

Act No. 1 of 1953 as amended

Inserted by Act No. 74 of 2010

357-60 When rulings are binding on the Commissioner

(1) Subject to subsection (5), a ruling binds the Commissioner in relation to you (whether or not you are aware of the ruling) if:

(a) the ruling applies to you; and

(b) you rely on the ruling by acting (or omitting to act) in accordance with the ruling.

Example 1: A public ruling is expressed to apply to a class of entities in relation to a particular scheme. Tim is a member of that class of entities and he is one of a number of taxpayers who enter into that scheme. The ruling applies to Tim.

Tim relies on the ruling by lodging an income tax return that is in accordance with the ruling.

Under the ruling, Tim's deductions in relation to the scheme are worked out to be a particular amount. Because Tim has relied on the ruling, the Commissioner must use that amount in making Tim's assessment (unless Tim stops relying on the ruling or the law is more favourable to him: see sections 357-65 and 357-70).

Example 2: Cecelia applies for, and obtains, a private ruling that, when she makes a payment in specified circumstances, she would not have to withhold an amount under a relevant provision. Cecelia makes the payment in the circumstances specified in the ruling, so the ruling applies to her.

Cecelia relies on the ruling by not withholding an amount from the payment. The Commissioner must not apply the provision in relation to Cecelia in a way that is inconsistent with the ruling (unless Cecelia stops relying on the ruling or the law is more favourable to her: see sections 357-65 and 357-70).

Example 3: Cathie obtains a private ruling that a type of supply she makes is GST-free. She relies on the ruling by:

(a) giving her customers invoices that show no GST payable on the supplies; and

(b) lodging her GST return on the basis that the supplies are GST-free.

The Commissioner must administer the GST law in relation to Cathie on the basis that the supplies to which the ruling relates are GST-free. This does not apply if Cathie stops relying on the ruling, such as by issuing tax invoices that show GST payable on the supplies: see paragraph (1)(b).

Note 1: A ruling about the amount of tax payable that binds the Commissioner provides protection in relation to that amount. There is no shortfall interest charge or tax shortfall penalty payable in respect of that amount as there can be no shortfall in tax payable.

Note 2: A ruling about the operation of a provision would stop applying to you if the provision is repealed, or is amended to have a different effect. However, if the provision is re-enacted and expresses the same ideas as the old provision, the ruling would still apply: see section 357-85.

(2) You may rely on the ruling at any time unless prevented from doing so by a time limit imposed by a *taxation law. It is not necessary to do so at the first opportunity.

GST rulings

(3) The *GST payable on a *supply or importation is the amount worked out in accordance with a ruling (if any) that:

(a) relates to the GST payable on the supply or importation; and

(b) binds the Commissioner in relation to the supplier or importer.

Note: The ruling will stop affecting the GST payable if the supplier or importer stops relying on the ruling: see paragraph (1)(b).

(4) Subsection (3) does not apply for the purposes of an objection to the ruling under section 359-60.

Indirect tax rulings

(5) An *indirect tax or excise ruling (except to the extent that the ruling relates to an *excise law) binds the Commissioner in relation to:

(a) an entity (the ***representative entity***) that is:

(i) the *representative member of a *GST group; or

(ii) the *joint venture operator of a *GST joint venture; or

(iii) the *representative of an *incapacitated entity; and

(b) an entity (the ***member entity***) that is:

(i) a *member of the GST group; or

(ii) a *participant in the GST joint venture; or

(iii) the incapacitated entity;

if, and only if, both the representative entity and the member entity rely on the ruling by acting (or omitting to act) in accordance with the ruling.

(6) Subsection (5) applies if:

(a) the ruling applies to the member entity; and

(b) the ruling relates to what would be:

(i) a liability of the member entity to *indirect tax; or

(ii) an entitlement of the member entity to a credit (other than a *fuel tax credit) under an *indirect tax law; or

(iii) an *increasing adjustment, a *decreasing adjustment, or a luxury car tax adjustment (within the meaning of the *Luxury Car Tax Act), that the member entity has;

if the rules in the indirect tax law relating to *GST groups, *GST joint ventures or *incapacitated entities did not apply; and

(c) because of those rules:

(i) if that indirect tax were payable, it would be payable by the representative entity; or

(ii) if there was an entitlement to that credit, it would be an entitlement of the representative entity; or

(iii) if any entity had that adjustment, it would be an adjustment that the representative entity had.

Taxation Administration Act 1953

Act No. 1 of 1953 as amended

14ZZ Person may seek review of, or appeal against, Commissioner's decision

If the person is dissatisfied with the Commissioner's objection decision (including a decision under paragraph 14ZY(1A)(b) to make a different private ruling), the person may:

(a) if the decision is a reviewable objection decision—either:

(i) apply to the Tribunal for review of the decision; or

(ii) appeal to the Federal Court against the decision; or

(b) otherwise—appeal to the Federal Court against the decision.

14ZZP Order of Federal Court on objection decision

Where the Federal Court hears an appeal against an objection decision under section 14ZZ, the Court may make such order in relation to the decision as it thinks fit, including an order confirming or varying the decision