

BETWEEN COMMISSIONER OF TAXATION  
Appellant

AND QANTAS AIRWAYS LIMITED  
Respondent

APPELLANT'S SUBMISSIONS



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*Part I – Publication*

1. The Appellant certifies that these submissions are in a form suitable for publication on the internet.

*Part II – Issue on the Appeal*

- 10 2. The issue on the appeal is whether the amounts in contest in the appeal, received and retained by the Respondent (“Qantas”) under agreements made with its customers, were received in connection with a supply of rights, obligations and services under those agreements.
- 15 3. If so, then for the purposes of Divisions 9, 17 and 29 of the *A New Tax System (Goods and Services Tax) Act 1999* (“the GST Act”), the supply was a taxable supply, the amounts were the price for that supply, and the GST payable for the supply was attributable to and included in the calculation of Qantas’ net amount for the tax periods in issue in the appeal; and in consequence the assessments objected to were not excessive.
- 20 4. The issue is not, as the Full Court of the Federal Court erroneously assumed it to be, whether the supply of carriage by air concurrently and conditionally promised by Qantas was the “relevant supply” or the “essence and sole purpose” of the

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transaction. Those questions do not address, or arise under, the language of the statute.

*Part III – Section 78B of the Judiciary Act*

- 5 5. The Appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 and respectfully submits that no such notice should be given.

*Part IV – Reports*

6. The judgment of the Full Court ([2011] FCAFC 113) is reported at (2011) 195 FCR 260, and also at 2011 ATC ¶20-276.
- 10 7. The decision of the Administrative Appeals Tribunal ([2010] AATA 977) is reported at (2010) 119 ALD 199 and 2010 ATC ¶10-165.

*Part V - Facts*

8. The factual context was not in dispute and is referred to in the reasons of the Tribunal at [2]-[3], [23]-[24] and of the Full Court at [16]-[21], [32]-[36]. The essential facts are as follows.
- 15 9. The amount in contest is the GST on consideration (“the unused fares”) received by Qantas (or members of its GST group<sup>1</sup>) from prospective passengers who failed to take flights for which reservations and payment had been made.
10. Qantas<sup>2</sup> entered into contracts with the prospective passengers on the terms of (i) its conditions of carriage and (ii) the fare rules applicable to the particular ticket purchased by the passenger.<sup>3</sup>
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<sup>1</sup> Qantas is the representative member of a GST group comprising itself and its subsidiaries, and as such is liable for payment of GST on supplies by members of the group, s 48-40 of the GST Act. Except where otherwise indicated, references to “Qantas” or “the Respondent” in these submissions are to all members of the GST group.

<sup>2</sup> Qantas offered tickets on the terms and conditions set out in its Conditions of Carriage (AB xx) and fare rules (AB xx). Jetstar Airways Pty Ltd, a subsidiary member of the GST group, offered tickets on its own Conditions of Carriage (AB xx) and fare rules (AB xx), which were similar but not identical. Material differences are noted below.

<sup>3</sup> Qantas conditions cl 6.1 (AB xx, “your ticket is the main evidence of our contract with you”), cl 2.1, 2.3, 2.5, 2.7 (AB xx); cl 1 (definition of Conditions of Carriage, AB xx); Jetstar conditions cl 2.1, 2.3, 2.4, 2.6 (AB xx). The fare rules are at AB xx (Qantas) and AB xx (Jetstar)

11. Materially, the contracts provided that subject to payment of the applicable fare<sup>4</sup> Qantas would make a reservation,<sup>5</sup> and would issue a ticket<sup>6</sup> which evidenced the contract between the passenger and Qantas, recorded the journey which “the fare covered,”<sup>7</sup> and was valid for a year from date of issue.<sup>8</sup> Qantas undertook to “take all reasonable measures necessary to carry you and your baggage” in accordance with the reservation, and if prevented from doing so to “carry you at the earliest opportunity on another of our scheduled services,” or to “re-route you to the destination,” or to make a refund.<sup>9</sup> Jetstar gave no guarantee that the flight would depart on schedule, but if it did not Jetstar undertook to “try to assist you to get to your destination,” and promised a refund if an alternative to a cancelled flight could not be arranged.<sup>10</sup> Passengers were entitled to a refund of the fare in the circumstances specified in the conditions of carriage and fare rules, but not otherwise.<sup>11</sup>
12. When a customer made and paid for a booking, Qantas held itself ready to carry the customer in accordance with its conditions of carriage,<sup>12</sup> recorded and processed the reservation<sup>13</sup> and reduced its inventory in the relevant class by one.<sup>14</sup>
13. The fares received by Qantas were calculated to recover the GST payable on their amount.<sup>15</sup> The GST component of unused fares was not refunded to the customers.<sup>16</sup>

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<sup>4</sup> Qantas conditions cl 4.3 and 5.5 (AB xx); Jetstar conditions cl 4.2 (AB xx) and 5.5 (AB xx)

<sup>5</sup> Qantas conditions 4.1 (AB xx); Jetstar, using the term “Booking” to mean the same thing, cl 1 (definition) and 4.1 (AB xx)

<sup>6</sup> Definitions cl 1 (AB xx (Qantas) and xx (Jetstar)); Qantas cl 6.1, AB xx. Tickets were ordinarily issued in electronic form.

<sup>7</sup> Clause 5.1 (AB xx, xx), “your fare covers the flight for you and your Baggage Allowance” from the departure airport to the destination airport; Qantas’ “flight coupon” (cl 1, AB xx) recorded the places between which the passenger was “entitled to be carried”

<sup>8</sup> Qantas cl 6.6 (AB xx). Jetstar allowed rebooking to a different date and time (fare rules cl 2, AB xx)

<sup>9</sup> Clause 9.2, AB xx

<sup>10</sup> Clause 9.2, 9.1, AB xx

<sup>11</sup> Some tickets were non-refundable, as specified in the fare rules, and where available refunds could only be claimed during the validity period. Fares for flights not taken because of default on Qantas’ part, or because of external circumstances, were refundable in some circumstances. Clauses 9 (AB xx, xx) and (Qantas only, AB xx) 13.

<sup>12</sup> Tribunal reasons at [24] (119 ALD 199, 206; AB xx); Qantas “does not hold itself ready to carry on a particular flight at a particular time or in a particular seat, but it does hold itself ready ‘to take all reasonable measures necessary to carry you and your baggage and to avoid delay in doing so.’”

<sup>13</sup> Tribunal reasons at [23], AB xx (119 ALD 199, 206); Owens at [28], AB xx, Gibson at [9]-[18], AB xx

<sup>14</sup> Evidence of Owens at [36], AB xx

In these proceedings, Qantas contends that GST is not payable on the unused fares, and that the GST paid on the unused fares should be refunded to it.

5 14. To resolve the dispute over the refund claim, the Appellant (“the Commissioner”) issued assessments of Qantas’ net amounts for the monthly tax periods from July 2005 to June 2008. The amount assessed was based on the net amount shown on Qantas’ Business Activity Statements and included GST on all fares received by Qantas in the months concerned, including unused fares.<sup>17</sup> Qantas objected to the inclusion in the net amounts assessed of GST on unused fares. The Commissioner disallowed the objection and Qantas referred that decision to the Administrative Appeals Tribunal.<sup>18</sup>

15. The Tribunal decided that there had been a supply of rights, obligations and services under the contracts between Qantas and the passengers, for which the unused fares were consideration as defined, and that the assessments were not shown to be excessive.<sup>19</sup>

15 16. On appeal by Qantas, the Full Court of the Federal Court held that “the relevant supply in the present case is the contemplated flight, not the reservation ... and the contemplated flight failed to occur” (at [49]), that the Tribunal had “artificially split the transaction” (at [57]), and in consequence that there had been no taxable supply where the flight was not taken: “it is plain that what each customer pays for is carriage by air. This is the essence, and sole purpose, of the transaction. ... The actual travel was the relevant supply, and if it did not occur there was no taxable supply.” (at [56]).

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<sup>15</sup> On payment of the fare, the GST amount was recorded as a debt due to the Commissioner, and the balance was credited to unearned income until the flight was taken or the fare forfeited: Gibson paras [8]-[19], AB xx

<sup>16</sup> The assessments before the Court total \$34,275,917 made up of \$26,604,347 in GST on forfeited fares (Qantas \$16,717,019 and Jetstar \$9,887,328) and \$7,671,570 in GST on refundable fares where no refund claim has been made.

Of the larger amount for which Qantas claimed a refund in its objections (AB xx), part related to tax periods for which the objection was out of time, and part is the subject of undetermined objections.

<sup>17</sup> The unused fares include both those for which at the end of the tax period assessed there was a refund entitlement not yet claimed, and those for which there was not, or by reason of delay was no longer, any refund entitlement at all.

<sup>18</sup> The assessment was made pursuant to *Taxation Administration Act 1953*, Schedule 1, s 105-5, objected to pursuant to s 105-40, and disallowed pursuant to *Taxation Administration Act* s 14ZY. The objection decision was referred to the Administrative Appeals Tribunal for review under s 14ZZ.

<sup>19</sup> AB xx [23-4], [26-7]

*Part VI – Appellant’s Argument*

*The matter in dispute in this appeal*

17. The Ch III “matter” before this Court is a dispute as to whether the Commissioner’s assessments of the net amounts of Qantas, for the tax periods in which the unused fares were received, are excessive.<sup>20</sup>

*The Appellant’s submission in summary*

18. The assessment for each tax period was not excessive, because the assessment correctly brought into account the unused fares as consideration in connection with a supply, of rights, obligations and services, attributable to that tax period.

19. The net amount for a period is determined, not by whether any or all of the attributable taxable supplies are provided in the period, but by the amount of consideration invoiced, or wholly or partly paid, in the tax period. The attributable taxable supplies may occur wholly or partly in an earlier or later tax period.

20. In the present appeal the unused fares were first received or invoiced in the tax periods assessed.<sup>21</sup> Each was received on or pursuant to the making of a contract between Qantas and a customer, by which Qantas supplied rights, obligations and services additional to the flight which was to have been provided. Each comprised “payment ... in connection with a supply”<sup>22</sup> of those rights, obligations and services, which was thereby a taxable supply attributable to that period. The assessments correctly included, in the net amount for each tax period, GST on a “price”<sup>23</sup> comprising the unused fares.

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<sup>20</sup> *Taxation Administration Act* s 14ZZK. Formally, the contest is as to whether the Tribunal erred on a question of law in concluding that the assessments were not excessive, s 44 of the *Administrative Appeals Tribunal Act 1977*, *TNT Skypak International (Aust) Pty Ltd v FC of T* (1988) 82 ALR 175, 178-183

<sup>21</sup> This was not in dispute below. The amounts in issue in each tax period were notified in Qantas’ objection to the assessments (AB xx [T19]), but no evidence of the amount or time of any receipt or invoice, nor as to any transaction involving an unused fare, was led, and no complaint was made of the absence of such evidence.

<sup>22</sup> Section 9-15(1)(a)

<sup>23</sup> Section 9-75(1) defines “price” as the monetary amount or value of the consideration for the supply. The value of the supply is 10/11ths of the price and the GST payable by the supplier is 1/10th of the value, being 1/11th of the price.

*The statutory scheme for payment of GST*

21. The obligation to make payment of GST is imposed by s 33-5 of the Act: the net amount for a tax period must be paid by the 21st day of the following month.<sup>24</sup> If there is no net amount, there is no obligation to make a payment.<sup>25</sup>
- 5 22. The net amount for a tax period is fixed by s 17-5: it is (GST - input tax credits),<sup>26</sup> 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.”
23. The GST on a taxable supply is attributable to the first tax period (hereunder “the attributable tax period”) in which any of the consideration for the supply is invoiced or received, s 29-5(1).
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24. Section 9-15 defines consideration to include “any payment ... in connection with a supply of anything.”
25. The statutory concept of “supply” is as wide as language can make it: by s 9-10(1) “a supply is any form of supply whatsoever,” and to emphasise the breadth of these words s 9-10(2) provides that “without limiting” them the term “includes any of,” inter alia, the creation of rights (para (e)), the assumption of obligations (para (g)) and any combination of the included matters mentioned (para (h)). But supply alone is not the criterion of liability: only a “taxable supply” can attract GST.
- 15
26. A taxable supply is defined in s 9-5 to include one made for consideration (as defined in s 9-15), in the course or furtherance of an enterprise, connected with Australia and by a registered person.<sup>27</sup> Thus a supply which is unconnected to an enterprise,<sup>28</sup> or a supply which is not for consideration,<sup>29</sup> will not give rise to liability to GST.
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<sup>24</sup> In Qantas’ case, each month was a tax period. The obligation of quarterly taxpayers is set out in s 33-3.

<sup>25</sup> If the net amount is negative, the Commissioner is obliged to make payment to the taxpayer: s 35-5

<sup>26</sup> By s 17-5(2), this amount is increased or decreased if there are adjustments for the tax period. Adjustments are provided for in Division 19, and may arise from refunds of consideration: s 19-10(1)(b), s 19-40 and s 19-55.

<sup>27</sup> Paragraphs (a) to (d) respectively of s 9-5. It is not in issue that the presently relevant transactions were undertaken in the course or furtherance of an enterprise by a registered person, and were connected with Australia.

<sup>28</sup> For example, family meals cooked at home by a restaurateur, or holiday photos taken by a professional photographer

<sup>29</sup> There is an exception for transactions with associates at other than market value, Division 72

27. Supplies which are GST-free or are input taxed are not taxable supplies.<sup>30</sup> For the purposes of determining whether there is a GST-free or input taxed supply, it may be necessary to identify and characterise the relevant supply. Those issues may be put aside in the present appeal: no supplies in connection with which the unused fares were paid were GST-free or input taxed.<sup>31</sup>
28. The effect of the statutory scheme is that GST on a transaction is payable once and once only: at the end of the attributable tax period.<sup>32</sup> The amount payable (and the amount of any corresponding input tax credit) is 1/11th of the consideration.
29. It is not necessary for taxpayers to value what is supplied, nor to identify whether there is more than one component of the supply (or more than one supply) in connection with which the consideration is paid, nor to allocate the consideration among any such components, nor to identify the tax periods in which components might have been supplied: it is payment of consideration which determines when, and how much, GST must be paid.<sup>33</sup>
30. GST is not payable twice by reason that the consideration is paid in connection with more than one supply. It will ordinarily be the case, even where there is no executory contract, that more than one event falling within the s 9-10 definition of "supply" will occur in connection with payment of the consideration – for example, a simple sale of goods will ordinarily involve a supply of the goods, of obligations arising under sale of goods and fair trading legislation, of rights under warranty, of packaging and (often) of delivery, but only one payment of price. GST on the price is not payable in each of the tax periods in which the several events occur, but only once in the tax period of invoice or first payment.<sup>34</sup>
31. The legislative scheme is that the amount to be paid to (or by) the Commissioner – the net amount for a tax period – is fixed by what consideration is first paid or

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<sup>30</sup> Section 9-5. GST-free and input taxed supplies are identified in Part 3-1, "Supplies that are not taxable supplies."

<sup>31</sup> The account of the statutory scheme at paragraphs 28 to 34 does not address the cases in which the supplies may be classified as GST-free or input taxed, or as not connected with Australia (s 9-5(c)).

<sup>32</sup> The due dates for payment in respect of quarterly and monthly tax periods are set by ss 33-3 and 33-5

<sup>33</sup> Tax avoidance transactions are dealt with in Division 165 and non-arm's length dealings between associates are dealt with in Division 72.

<sup>34</sup> The "second supply" issue agitated by the taxpayer in *FC of T v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342, 356 [41], is a false issue: it does not matter how many supplies there are, GST is payable only in the tax period in which the consideration is invoiced or first received and only once on the amount of consideration. Division 99 fixes which tax period is the attributable tax period in respect of a security deposit; it does not authorise multiple liabilities.

invoiced in the period. That amount is not retrospectively reduced because in a later tax period one of the supplies for which consideration has been invoiced or paid is not made.<sup>35</sup>

*A self-assessed tax*

- 5        32. The amount of GST payable by or refundable to a registered taxpayer in each tax period is dependent not upon the issue of an assessment,<sup>36</sup> but upon the “net amount” for the tax period, which the taxpayer itself is required to ascertain, report<sup>37</sup> and pay.<sup>38</sup>
- 10        33. What determines the net amount for a tax period is the amounts of consideration invoiced or first paid in the period,<sup>39</sup> not the supplies or creditable acquisitions made in the period: thus
- 15            (a) the taxable supplies for which those amounts are consideration may occur wholly or partly in the same or in earlier or later tax periods, or not at all,<sup>40</sup> without affecting the ascertainment of the net amount for the attributable tax period.
- (b) a cancellation in a later tax period of a contract for a taxable supply, or a change in a later period in the amount of consideration, does not result in a change to the net amount for the attributable tax period, but in an adjustment<sup>41</sup> to the net amount of the later period.<sup>42</sup>

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<sup>35</sup> Instead, in some cases, there may be an adjustment in the later tax period, see further paragraph [33] below. The Commissioner may accept an amended return which corrects errors in the original return, as distinct from recording a retrospective variation of the net amount.

<sup>36</sup> The Commissioner may “at any time” issue an assessment, *Taxation Administration Act* 1953 Schedule 1 s 105-5. An assessment may, as happened here, be issued as a result of an audit of the taxpayer’s affairs, or on the request of a taxpayer (s 105-10) so that the objection and appeal provisions in Part IVC of the *Taxation Administration Act* are invoked.

<sup>37</sup> Division 31 imposes obligations to file returns

<sup>38</sup> Division 33; or the taxpayer may be entitled to a refund, which the Commissioner is obliged to pay, Division 35.

<sup>39</sup> An input tax credit is not deductible from the net amount unless and until a tax invoice is held, s 29-10(3)

<sup>40</sup> If a contracted taxable supply for which consideration has been invoiced or part-paid in advance is later not made, and the invoice amount is not fully paid or there is a refund, the Act provides for an adjustment to the net amount for the later tax period in which it becomes apparent that the supply will not be made, s 19-10, s 19-40, s 29-20, but the net amount for the earlier attributable tax period is not varied.

<sup>41</sup> The amount of the adjustment is the difference between the GST included in the calculation of the earlier net amount and the amount payable in consequence of the change, Sub-division 19-B

34. The scheme of the GST, a value-added tax, is that GST is imposed on business taxpayers but borne ultimately by the consumer, through the setting of prices to recover the GST imposed; double taxation is avoided by the grant to the acquirer of input tax credits,<sup>43</sup> so that the net imposition is only on the value added at each stage.<sup>44</sup> The practical operation of the scheme requires certainty as to the point at which and amount in which GST is payable and input tax credits are allowable. That certainty is provided by adopting the consideration paid for the supply<sup>45</sup> as the measure and occasion of both liability to tax and entitlement to credit.

*The taxable supply by Qantas*

35. The contract formed between Qantas and the passenger upon the making of the booking or reservation conferred rights on the passenger and imposed obligations on Qantas.<sup>46</sup> In performance of the contract, Qantas made reservations<sup>47</sup> as requested by the customer.

36. The creation of those rights on the making of the contract, and the making of the reservation, are each included in the definition of a "supply" in subsection (1) of s 9-10 ("any form of supply whatsoever") and in paragraphs (b), (e), (g) and (h) of subsection (2). As the unused fares were received in connection with the making of the contract and reservation,<sup>48</sup> they comprise "consideration" (s 9-15(1)) for the supply of the rights and reservation, which is thus a taxable supply (s 9-5).

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<sup>42</sup> Division 19 (cancellation of or change in the price for a supply, s 19-10) and Division 21 (where the debt for the invoice amount becomes a bad debt). The adjustment is attributable to, and so affects the net amount of, the tax period in which the taxpayer becomes aware of the adjustment, s 29-20.

The question of later adjustment did not arise in the present case: Qantas led no evidence of any refund of the unused fares, and made no claim for adjustment.

<sup>43</sup> The acquirer's input tax credit is equal to the supplier's liability to GST, s 11-25

<sup>44</sup> *HP Mercantile Pty Ltd v FC of T* (2005) 143 FCR 553, 557 [13]-[15]

<sup>45</sup> Rather than, for example, requiring taxpayers to undertake for each transaction a valuation of what is supplied.

<sup>46</sup> The contract also conferred rights on Qantas, which relies on the contract as the source of its right to retain the unused fare.

<sup>47</sup> Qantas "recorded [them] as accepted and confirmed," cl 4.1, AB xx and xx, and reduced "its inventory in the relevant fare by one" (Owens at [36], AB xx), viz, "held itself ready to carry the passenger in accordance with its conditions of carriage," Tribunal reasons at [24] AB xx.

<sup>48</sup> The suggestion in the Full Court judgment at 195 FCR 260, 273 [38] (AB xx) that the customer's payment "has a connection ... with the flight rather than with the entry into the contract" poses the same false dichotomy as underlies the reasoning at [56]. The fare is paid in connection with, and is consideration for, all the rights, obligations and services supplied under the contract, including the flight; that it is in connection with one of them does not preclude it from being in connection with the others.

37. In consequence the unused fares enter into the calculation of the net amount for the tax period in which they are received, as consideration for a taxable supply, s 29-5(1). They were correctly so assessed by the Commissioner.

5 38. The objection decision (that the assessments were not excessive) was correctly affirmed by the Tribunal. The Full Court erred in setting it aside and directing the objection to be allowed.

*The errors in the decision of the Full Court*

39. The Full Court erred

10 (a) in not addressing the statutory issue posed by the objection decision referred to the Tribunal for review: whether the net amount assessed was excessive by reason that no GST on the “price” comprising the unused fares was attributable to the tax period in which the unused fares were received, and

15 (b) in importing into the perceived operation of the statute a limitation not found in its language, namely, that an amount may only be taken into the calculation of the net amount if it is consideration for a “relevant” supply, one which is the “essence and sole purpose” of the transaction, “nothing more and nothing less.” None of these words of limitation, nor anything importing their meaning, appears in the statute, and the qualification imported by the Full Court is repugnant to the breadth directed by the clear  
20 words of s 9-10.

(i) *the statutory issue*

25 40. Section 14ZZK of the *Taxation Administration Act* required the Tribunal to decide whether each assessment of net amount was excessive.<sup>49</sup> To conclude that the assessment was excessive, the Tribunal (and the Full Court) must at least find that an amount included in the calculation of the assessed net amount as the consideration for a supply<sup>50</sup> was not consideration for a supply: that is, that it was not a “payment ... in connection with ... [or] in response to or for the inducement of

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<sup>49</sup> Section 14ZZK(b)(i), *FC of T v Dalco* (1990) 168 CLR 614, 621.6, 631.4.

<sup>50</sup> By s 9-75(1) GST at the rate of 10% is imposed on the value, which is 10/11ths of the price, of a taxable supply. The price of a supply is the consideration for the supply. Consideration is defined in s 9-15(1).

a supply of *anything*,” whether or not voluntary and whether or not from the recipient of the supply.<sup>51</sup>

5 41. The statutory question posed by ss 9-75 and 9-15 is whether there was a supply of *anything* for which the unused fares were consideration (ie, in connection with which they were paid). The Tribunal addressed that question and found that there was. The Full Court dismissed the statutory question and substituted its own: not whether the unused fares were paid in connection with anything that *was* supplied, but whether they were paid in connection with something (a flight) that was *not* supplied. As this court held in *FC of T v Reliance Carpet Co Pty Ltd*,<sup>52</sup> that is the  
10 wrong question: see paragraphs [47]-[51] below.

42. For the reasons above, the statutory question should be answered “yes”: by and under the contracts by which it received and retained the unused fares, Qantas supplied rights, obligations and services other than the flights booked.

(ii) *the “relevant” supply*

15 43. The Full Court justified its answer on the ground that “the actual travel was the relevant supply, and if it did not occur there was no taxable supply.”<sup>53</sup> It embellished the premise by adding that the flight was “the essence, and sole purpose, of the transaction. The prospective supply is of air travel, dare we say, in the face of *Reliance Carpet* (at [13]), ‘nothing more or less’.”

20 44. None of these terms appears in the GST Act, and there is no warrant for importing them. What the Act does say is that “a supply is *any* form of supply *whatsoever*,” that “consideration includes *any* payment ... *in connection with* a supply of *anything*,” and that a taxable supply is (relevantly) one made for consideration. There is no basis for limiting words of such explicit breadth by notions of essence,  
25 purpose or “relevance.”

45. In support of its premise, the Full Court cited<sup>54</sup> decisions addressing the “substance” or “purpose” of transactions. The decisions and observations relied upon are not in point: they were directed to a question different from that which arises in the present appeal. The present issue is whether there was a supply in connection with

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<sup>51</sup> Section 9-15(1), (2), emphasis added

<sup>52</sup> (2008) 236 CLR 342

<sup>53</sup> (2011) 195 FCR 260, 278 [56], AB xx

<sup>54</sup> (2011) 195 FCR 260 at 275-8, [46]-[55], [57]

which the unused fares were received. The issue in the cases cited by the Full Court was whether, it being established or conceded that there was a supply, the supply was of such a class or character as to attract a specified consequence under the Act:

5 (a) in *Saga Holidays Ltd v FC of T*<sup>55</sup> the question was whether the supply made by the taxpayer was “connected with Australia” within s 9-5(c), and in particular whether the supply was of “real property” in Australia within s 9-25(4). The court held that it sufficiently had that character to satisfy s 9-5(c).

10 (b) in *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd*<sup>56</sup> it was held that although neither had been party to the registered lease upon grant, the purchaser of a reversion made a supply of obligations, attracting s 9-10(2)(g), to an assignee of the lease, and that all the amounts payable by the tenant, including a share of expenses, were consideration “in connection with” that supply.

15 (c) in *Re AGR Joint Venture*<sup>57</sup> the question was whether the taxpayer’s supply was a single supply of coin blanks, or two distinct supplies, of precious metal “in investment form”<sup>58</sup> and of fabrication services. The Tribunal held that the supply was a supply of manufactured coin blanks, not of precious metal in investment form.<sup>59</sup>

20 (d) in *Travelex Ltd v FC of T*<sup>60</sup> the issue was whether foreign currency notes supplied by the taxpayer could be characterised as a “supply ... in relation to rights” attracting the exemption in s 38-190. This Court by majority held that the supply of the notes was sufficiently<sup>61</sup> a supply in relation to rights to attract the exemption.

25 None of these authorities assist in determining whether there was a supply in connection with which the unused fares were received.

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<sup>55</sup> (2005) 149 FCR 41 (Conti J), (2006) 156 FCR 256 (Full Court)

<sup>56</sup> (2006) 152 FCR 461, 476 [57], 478 [61]

<sup>57</sup> (2007) 70 ATR 466

<sup>58</sup> A supply of precious metal was either GST-free, s 38-385, or input taxed, s 40-100, according to the circumstances, if the precious metal was “in investment form” and of 99.9% or more fineness, s 195-1

<sup>59</sup> (2007) 70 ATR 466 at 477 [53]

<sup>60</sup> (2010) 241 CLR 510

<sup>61</sup> (2010) 241 CLR 510, per French CJ and Hayne J at 520 [26]: “Currency has value only because of the rights that attach to it.” of at 520 [27], 522 [34]. Heydon J agreed at 524 [46]-[47].

46. All that the statute requires is that there be a taxable supply in connection with which the amount (here the unused fare) is received. If so, the amount is included in the “price” by reference to which GST is calculated,<sup>62</sup> the GST is attributable to the period in which the unused fare is received,<sup>63</sup> and the net amount for the period is calculated including that GST.<sup>64</sup>

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(iii) *The decision in Reliance Carpet*

47. The Full Court’s reliance on passages from the decision of this Court in *FC of T v Reliance Carpet Co Pty Ltd*<sup>65</sup> is misplaced. The passages cited are taken out of context and do not support the Full Court’s conclusion.

10 48. The issue in *Reliance Carpet Co* was whether GST was payable in respect of the amount of a deposit forfeited upon breach of a contract for sale of land. Section 99-5, which deems the deposit not to be consideration for a supply unless the deposit is forfeited, was not attracted, because the deposit had been forfeited. Section 99-10 deems the GST on a supply for which the consideration was a deposit to be attributable to the tax period of forfeiture. The Full Federal Court accepted<sup>66</sup> the taxpayer’s submission that the “essential” or “principal” supply was the sole subject of tax, that in the instant case it was a supply of real property, “nothing more and nothing less,”<sup>67</sup> and that as there had been no supply of real property there was no taxable supply. That decision was reversed on appeal.

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20 49. This Court, after noting the legislative scheme,<sup>68</sup> rejected the basis of the Full Court decision: the issue was not whether land was supplied but “whether there was ‘a taxable supply’ to which GST was attributed for the relevant tax period.”<sup>69</sup>

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[13] ... The circumstance that the contract did not proceed to completion does not necessarily prevent there having been a “supply” when the contract was entered into; the ultimate issue is whether there was “a taxable supply” to which GST was attributed for the relevant tax period.

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<sup>62</sup> Section 9-75(1)

<sup>63</sup> Section 29-5(1)

<sup>64</sup> Section 17-5

<sup>65</sup> (2008) 236 CLR 342

<sup>66</sup> *Reliance Carpet Co Pty Ltd v FC of T* (2007) 160 FCR 433 at 438 [13(3), (4) and (5)]

<sup>67</sup> 160 FCR 433, 445 [18]

<sup>68</sup> 236 CLR 342, 347 [9]-[11]

<sup>69</sup> 236 CLR 342, 348 [13]

...

5 [28] The circumstance that the deposit forfeited to the taxpayer 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 taxable supply. It is sufficient for the Commissioner's case that the presence of one or more of these characteristics satisfies the criterion of "consideration" for the application of the GST provisions respecting a "taxable supply".<sup>70</sup>

10 The Court adopted the conclusion of the Tribunal that on execution of the contract the taxpayer made a s 9-10(2)(g) supply of an obligation to do "the things it was bound to do under the contract."<sup>71</sup>

15 50. The Full Court in the present appeal<sup>72</sup> construed the decision in *Reliance Carpet* as one resting on the premise that the "statute mandated" resort to the executory contract as comprising the relevant supply, construing paragraphs [34] and [40] of this Court's judgment as deciding that the effect of Division 99 was that upon forfeiture the making of the contract "became" a taxable supply, so that absent the application of that Division an executory contract did not "become" a taxable supply, because absent that application it was not "the relevant supply." In so reasoning, and preferring the "relevant supply," "nothing more and nothing less" concept from its own judgment in *Reliance Carpet Co*, the Full Court fell into error.

20 51. In *Reliance Carpet* this Court construed Division 99 as an attribution mechanism, a "wait and see" provision,<sup>73</sup> by which a security deposit, which otherwise would on payment be consideration for a supply under the executory contract,<sup>74</sup> is taken to be such consideration only when and if it is either forfeited or applied on completion,<sup>75</sup> and not, for example, if it is refunded on rescission of the contract. At the time of forfeiture the suspending operation of s 99-5 ceased, and in that (timing) sense the supply "became" a taxable supply.

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<sup>70</sup> 236 CLR 342, 348 [13], 352 [28]

<sup>71</sup> 236 CLR 342, 355 [37]

<sup>72</sup> (2011) 195 FCR 260, 273-4 [43]-[45]

<sup>73</sup> 236 CLR 342, 354 [35]

<sup>74</sup> 236 CLR 342, 353 [33]: "The payment of the deposit by the purchaser to the taxpayer was "in connection with" a supply by the taxpayer, within the meaning of the definition of "consideration" in s 9-15(1)(a) of the Act. That connection is readily seen from ...[entry] into the mutual legal relations with the executory obligations and rights laid out in the Contract."

<sup>75</sup> Respectively paras (a) and (b) of each of ss 99-5(1) and 99-10(1). In *Reliance Carpet* the deposit was forfeited and the alternative basis of attribution (completion) in para (b) of ss 99-5(1) and 99-10(1) did not arise for consideration

52. In the present case, it is not in question that the unused fare is an amount paid in connection with the making of the executory contract.<sup>76</sup> It is in consequence “consideration” qualifying the supply as a taxable supply. The mechanism of Division 99 is not invoked.

5 53. In neither case is it necessary or appropriate to resort to a concept of “relevant supply,” and to do so is (as this Court held in *Reliance Carpet*) to fall into error.

(iv) *Implications of the Full Court decision*

10 54. The amount of GST on a taxable supply is a function of the amount of consideration received, and the scheme of the GST is that it should be recovered from the recipient of a supply in the calculation of the consideration, and at the same time give rise to an input tax credit to qualifying payers of the consideration. If the decision of the Full Court is correct, the extent of the Division 33 obligation to pay a s 17-5 net amount – both of taxpayers receiving consideration and of those paying it and claiming input tax credits – cannot be ascertained for a tax period until it has later<sup>77</sup> been ascertained either that the “relevant” (“essential and sole purpose”) supply has been made or that it will never be made. The scheme for collection on a quarterly or monthly basis<sup>78</sup> is disrupted by the Full Court decision: underpayment by the taxpayer exposes the taxpayer to penalties<sup>79</sup> and the Commissioner to risks of irrecoverability,<sup>80</sup> while overpayment exposes the taxpayer to risks of inability to recover the overpayment.<sup>81</sup>

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55. The unused fares in issue in this appeal are sums which at the end of the tax period Qantas’ customers had forfeited, or of which they had not sought and might never seek a refund. It is inconsistent with the scheme of the GST that a payment, which under its agreement with its customer the taxpayer is entitled to retain, should be

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<sup>76</sup> Contrary to the assumption of the Full Court at (2011) 195 FCR 260, 274 [44], the contract constituting the supply was not “cancelled” or rescinded; Qantas relied on the contract as its authority to retain the amount paid as the fare. Rather, full performance of the contract was not insisted upon.

<sup>77</sup> Possibly months or years later: airline and accommodation bookings are often made long in advance to secure discounts, and construction contracts may be delayed for years by planning approval delays.

<sup>78</sup> The statutory obligation of monthly tax payers is to report and pay the correct net amount within 21 days of the end of the end of the month, ss 31-10 and 33-5. Quarterly tax payers must report and pay within the longer periods specified in s 31-8 and 33-3

<sup>79</sup> Taxpayers are subject to penalties for false statements (*Taxation Administration Act 1953*, Schedule 1, Division 284) and late payments (GST Act s 162-100, s 168-10 and *Taxation Administration Act 1953*, Part IIA).

<sup>80</sup> *Taxation Administration Act*, Schedule 1, s 105-50

<sup>81</sup> *Taxation Administration Act*, Schedule 1, ss 105-55 and 105-65

excluded from the scope of the GST by reason of the circumstance that the customer later fails or chooses not to take up some or all of the goods or services agreed to be provided.

56. Reasoning which yields results so antithetical to the legislative scheme should not be accepted unless the statutory language is so intractable that no alternative construction is open.

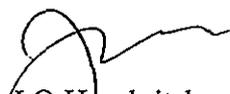
*Part VII – Legislation*

57. The relevant statutory provisions as in force in the relevant tax periods are attached as Appendix A.

*Part VIII – Orders sought*

58. The Appellant seeks the following orders:
1. Appeal allowed.
  2. Set aside the orders of the Full Court of the Federal Court dated 1 September 2011 and in their place order that the appeal to that Court be dismissed with costs.
  3. The Respondent pay the Appellant's costs in this Court.

Date: 9 March 2012

  
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## 9-10 Meaning of *supply*

- (1) A *supply* is any form of supply whatsoever.
- (2) Without limiting subsection (1), *supply* includes any of these:
- (a) a supply of goods;
  - (b) a supply of services;
  - (c) a provision of advice or information;
  - (d) a grant, assignment or surrender of *real* property;
  - (e) a creation, grant, transfer, assignment or surrender of any right;
  - (f) a *financial* supply;
  - (g) an entry into, or release from, an obligation:
    - (i) to do anything; or
    - (ii) to refrain from an act; or
    - (iii) to tolerate an act or situation;
  - (h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).
- (3) It does not matter whether it is lawful to do, to refrain from doing or to tolerate the act or situation constituting the supply.
- (3A) For the avoidance of doubt, the delivery of:
- (a) livestock for slaughtering or processing into *food*; or
  - (b) game for processing into *food*;
- under an arrangement under which the entity making the delivery only relinquishes title after *food* has been produced, is the supply of the livestock or game (regardless of when the entity relinquishes title). The supply does not take place on or after the subsequent relinquishment of title.
- (4) However, a supply does not include a supply of *money* unless the money is provided as *consideration* for a supply that is a supply of money.

## 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.

## Subdivision 9-C—How much GST is payable on taxable supplies?

### 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.

## Part 2-4—Net amounts and adjustments

### Division 17—Net amounts and adjustments

#### 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.

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

#### 17-10 Adjustments

If you have any adjustments that are attributable to a tax period applying to you, alter your net amount for the period as follows:

- (a) add to the amount worked out under subsection 17-5(1) for the period the sum of all the increasing adjustments (if any) that are attributable to the period;
- (b) subtract from that amount the sum of all the decreasing adjustments (if any) that are attributable to the period.

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

...

## Division 19—Adjustment events

### 19-10 Adjustment events

(1) An *adjustment event* is any event which has the effect of:

- (a) cancelling a supply or acquisition; or
- (b) changing the \*consideration for a supply or acquisition; or
- (c) causing a supply or acquisition to become, or stop being, a \*taxable supply or \*creditable acquisition.

Example: If goods that are supplied for export are not exported within the time provided in section 38-185, the supply is likely to become a taxable supply after originally being a supply that was GST-free.

(2) Without limiting subsection (1), these are \*adjustment events:

- (a) the return to a supplier of a thing, or part of a thing, supplied (whether or not the return involves a change of ownership of the thing);
- (b) a change to the previously agreed \*consideration for a supply or acquisition, whether due to the offer of a discount or otherwise;
- (c) a change in the extent to which an entity that makes an acquisition provides, or is liable to provide, consideration for the acquisition (unless the entity \*accounts on a cash basis).

(3) An \*adjustment event:

- (a) can arise in relation to a supply even if it is not a \*taxable supply; and
- (b) can arise in relation to an acquisition even if it is not a \*creditable acquisition.

(4) However, the return of a thing supplied, or part of a thing supplied, to its supplier is not an \*adjustment event if the return is for the purpose of repair or maintenance.

### 19-40 Where adjustments for supplies arise

You have an *adjustment* for a supply for which you are liable to pay GST (or would be liable to pay GST if it were a \*taxable supply) if:

- (a) in relation to the supply, one or more \*adjustment events occur during a tax period; and
- (b) GST on the supply was attributable to an earlier tax period (or, if the supply was not a taxable supply, would have been attributable to an earlier tax period had the supply been a taxable supply); and
- (c) as a result of those adjustment events, the \*previously attributed GST amount for the supply (if any) no longer correctly reflects the amount of GST (if any) on the supply (the *corrected GST amount*), taking into account any change of circumstances that has given rise to an adjustment for the supply under this Subdivision or Division 21.

...

## Part 2-6—Tax periods

### Division 27—How to work out the tax periods that apply to you

#### 27-15 Determination of one month tax periods

- 5
- (1) The Commissioner must determine that the *tax periods* that apply to you are each individual month if:
- (a) the Commissioner is satisfied that your *annual turnover* meets the *tax period turnover threshold*; or
- 10 (b) the Commissioner is satisfied that the period for which you will be *carrying on an enterprise* in Australia is less than 3 months; or
- (c) the Commissioner is satisfied that you have a history of failing to comply with your obligations under a *taxation law*.
- (2) The determination takes effect on the day specified in the determination. However, the day specified must be 1 January, 1 April, 1 July or 1 October.
- 15 (3) The *tax period turnover threshold* is:
- (a) \$20 million; or
- (b) such other amount as the regulations specify.
- However, if the regulations change the tax period turnover threshold, the change does not apply to you until the start of the next tax period that starts after the regulation in
- 20 question comes into operation.

...

### Division 29—What is attributable to tax periods

#### Subdivision 29-A—The attribution rules

#### 29-5 Attributing the GST on your taxable supplies

- 25 (1) The GST payable by you on a *taxable supply* is attributable to:
- (a) the tax period in which any of the *consideration* is received for the supply; or
- (b) if, before any of the consideration is received, an *invoice* is issued relating to the supply—the tax period in which the invoice is issued.
- (2) However, if you *account* on a cash basis, then:
- 30 (a) if, in a tax period, *all* of the *consideration* is received for a *taxable supply*—GST on the supply is attributable to that tax period; or
- (b) if, in a tax period, *part* of the consideration is received—GST on the supply is attributable to that tax period, but only to the extent that the consideration is received in that tax period; or
- 35 (c) if, in a tax period, *none* of the consideration is received—none of the GST on the supply is attributable to that tax period.
- (c) if, in a tax period, *none* of the consideration is received—none of the GST on the supply is attributable to that tax period.

## 29-10 Attributing the input tax credits for your creditable acquisitions

- (1) The input tax credit to which you are entitled for a \*creditable acquisition is attributable to:
- (a) the tax period in which you provide any of the \*consideration for the acquisition; or
  - (b) if, before you provide any of the consideration, an \*invoice is issued relating to the acquisition—the tax period in which the invoice is issued.
- (2) However, if you \*account on a cash basis, then:
- (a) if, in a tax period, you provide *all* of the \*consideration for a \*creditable acquisition—the input tax credit for the acquisition is attributable to that tax period; or
  - (b) if, in a tax period, you provide *part* of the consideration—the input tax credit for the acquisition is attributable to that tax period, but only to the extent that you provided the consideration in that tax period; or
  - (c) if, in a tax period, *none* of the consideration is provided—none of the input tax credit for the acquisition is attributable to that tax period.
- (3) ...

## Part 2-7—Returns, payments and refunds

### Division 31—GST returns

#### 31-5 Who must give GST returns

- (1) If you are \*registered or \*required to be registered, you must give to the Commissioner a \*GST return for each tax period.
- (2) You must give the return whether or not:
- (a) your \*net amount for the tax period is zero; or
  - (b) you are liable for the GST on any \*taxable supplies that are attributable to the tax period.

#### 31-10 When GST returns must be given—other tax periods

- (1) You must give your \*GST return for a tax period (other than a \*quarterly tax period) to the Commissioner:
- (a) on or before the 21st day of the month following the end of that tax period; or
  - (b) within such further period as the Commissioner allows.

### Division 33—Payments of GST

#### 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

### 33-5 When payments of net amounts must be made—other tax periods

- 5
- (1) If the net amount for a tax period (other than a quarterly tax period) applying to you is greater than zero, you must pay the net amount to the Commissioner on or before the 21st day of the month following the end of that tax period.
  - (2) However, if the tax period ends during the first 7 days of a month, you must pay the net amount to the Commissioner on or before the 21st day of that month.
- ...

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## Division 35—Refunds

### 35-5 Entitlement to refund

If the net amount for a tax period is less than zero, the Commissioner must, on behalf of the Commonwealth, pay that amount (expressed as a positive amount) to you.

...

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## Chapter 4—The special rules

...

### Division 99—Deposits as security

#### 99-5 Giving a deposit as security does not constitute consideration

- 20
- (1) A deposit held as security for the performance of an obligation is not treated as consideration for a supply, unless the deposit:
    - (a) is forfeited because of a failure to perform the obligation; or
    - (b) is applied as all or part of the consideration for a supply.
  - (2) This section has effect despite section 9-15 (which is about consideration).

#### 99-10 Attributing the GST relating to deposits that are forfeited etc.

- 25
- (1) The GST payable by you on a taxable supply for which the consideration is a deposit that was held as security for the performance of an obligation is attributable to the tax period during which the deposit:
    - (a) is forfeited because of a failure to perform the obligation; or

(b) is applied as all or part of the consideration for a supply.

- (2) This section has effect despite section 29-5 (which is about attributing GST for taxable supplies).

...

# Taxation Administration Act 1953

Act No. 1 of 1953 as amended

## Part IVC—Taxation objections, reviews and appeals

### Division 3—Taxation objections

#### 14ZY Commissioner to decide taxation objections

(1) Subject to subsection (1A), if the taxation objection has been lodged with the Commissioner within the required period, the Commissioner must decide whether to:

- (a) allow it, wholly or in part; or
- (b) disallow it.

(1A) If the taxation objection is an objection under subsection 359-50(3) in Schedule 1 against the Commissioner's failure to make a private ruling, the Commissioner must:

- (a) make a private ruling in the same terms as the draft ruling lodged with the objection; or
- (b) make a different private ruling.

(2) Such a decision is in this Part called an *objection decision*.

(3) The Commissioner must cause to be served on the person written notice of the Commissioner's objection decision.

#### 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 both a reviewable objection decision and an appealable 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) if the decision is a reviewable objection decision (other than an appealable objection decision)—apply to the Tribunal for review of the decision; or
- (c) if the decision is an appealable objection decision (other than a reviewable objection decision)—appeal to the Federal Court against the decision.

...

## **Division 4—AAT review of objection decisions and extension of time refusal decisions**

### **14ZZK Grounds of objection and burden of proof**

5 On an application for review of a reviewable objection decision:

- (a) the applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and
  - (b) the applicant has the burden of proving that:
    - 10 (i) if the taxation decision concerned is an assessment (other than a franking assessment)—the assessment is excessive; or
    - (ii) if the taxation decision concerned is a franking assessment—the assessment is incorrect; or
    - 15 (iii) in any other case—the taxation decision concerned should not have been made or should have been made differently.
- 

## **Schedule 1—Collection and recovery of income tax and other liabilities**

### **Chapter 3—Collection, recovery and administration of other taxes**

#### **Part 3-10—Indirect taxes**

#### **Division 105—General rules for indirect taxes**

##### **25 105-5 Commissioner may make assessment of indirect tax**

- (1) The Commissioner may at any time make an assessment of:
  - (a) your net amount, or any part of your net amount, for a tax period; or
  - (b) your net fuel amount, or any part of your net fuel amount, for a tax period or fuel tax return period.
- 30 (2) The Commissioner may at any time make an assessment of the amount of indirect tax payable by you on an importation of goods.
- (3) The Commissioner may make an assessment under this section even if he or she has already made an assessment for the tax period, fuel tax return period or importation concerned.

35 ...

##### **105-40 Reviewable indirect tax decisions**

- (1) You may object, in the manner set out in Part IVC, against a decision you are dissatisfied with that is a reviewable indirect tax decision relating to you.

- (2) A decision under section 105-5 or 105-25 involving an assessment of a net amount, a net fuel amount or an amount of indirect tax is a *reviewable indirect tax decision*.

...

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## **Administrative Appeals Tribunal Act 1975**

Act No. 91 of 1975 as amended

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### **Part IVA—Appeals and references of questions of law to the Federal Court of Australia**

#### **44 Appeals to Federal Court of Australia from decisions of the Tribunal**

*Appeal on question of law*

- (1) A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

15

...

...

**(B) WHETHER PROVISIONS STILL IN FORCE IN THIS FORM**

The above provisions are still in force, in that form, at the date of these submissions, with the exception of s 19-40, which has been amended. The appellant respectfully submits that the amendments are not relevant to this appeal. The amending legislation is as follows:

*Tax Laws Amendment (2010 GST Administration Measures No. 1) Act 2010*

...

**3 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

...

**Schedule 1—Adjustments for third party payments**

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

...

**2 Paragraphs 19-40(c) and 19-45(c)**

After “Division 21”, insert “or 134”.