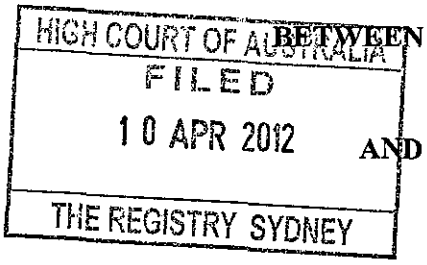
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S47 of 2012



BETWEEN

COMMISSIONER OF TAXATION
Appellant

AND

QANTAS AIRWAYS LIMITED
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

The Flaws in the Respondent's Argument

1. Qantas' submissions suffer from the following essential flaws: that they

   (a) fail to address the question tendered for resolution by the Tribunal and in the appeal, which is whether the assessments of net amounts were excessive;

   (b) instead address an issue, that of characterisation, which does not arise in the appeal;

   (c) confuse the correct issue, whether there was a supply in connection with which the unused fares were consideration, with a false issue, whether a flight was not supplied in connection with an unused fare;

   (d) address not what was supplied but what was not supplied, and

   (e) pay inadequate attention to the statutory language.

The task of the Tribunal and on appeal

2. The issue posed by s 14ZZK of the Taxation Administration Act is whether the assessment objected to is excessive. That issue directs attention to Divisions 17, 19 and 29 of the GST Act, which are central to the appeal and not to be dismissed as "accounting details" or "technicalities." It is satisfaction of the s 17-5 criteria for inclusion of an amount in the "net amount" for a tax period that determines whether an assessment including that amount is thereby excessive.

Filed on behalf of:the Appellant

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Characterisation is a false issue in the appeal

3. Issues of characterisation (expressed as questions of "essential character" or of identifying a "relevant supply") arise where the issue is whether the supply in connection with which an amount is received as consideration is a taxable supply, an input taxed supply or a GST-free supply.[1] They do not arise in this case, where all potential supplies were taxable supplies, and the only issue for resolution is whether there was any supply at all in connection with the receipts taken into the calculation of the assessed net amounts.

Whether no flight was supplied is a false issue in the appeal

4. Fundamental to Qantas' submissions is the proposition that the "sole issue" is whether Qantas supplied the flights for which the unused fares were paid: the essential contention is that there was no supply of the flight.

5. The contention is correct (the Commissioner does not contend that an actual flight was supplied to the "no-show" customers) but irrelevant. It diverts attention from the question central to the dispute as to whether the assessment was excessive: was there a supply (or conversely was there *no* supply) in connection with which[2] the unused fare, received by Qantas and taken into account in calculating the GST included in the assessed net amount, was received as "consideration"? If there was a supply – any supply – in connection with which the unused fare was received, that supply was attributable[3] to the tax period of receipt and the amount of GST on the unused fare is properly included in calculating the net amount.

Liability turns on what was supplied, not on what was not supplied

6. Qantas' submissions are addressed to events which did not occur (flights which were not taken). The GST Act is concerned with events which did occur: with whether there was a supply in connection with which the amount in fact received was consideration, so as to enter into the calculation of the net amount assessed.

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1 The cases referred to in Qantas' submissions (e.g. at footnotes 23 and 25) concern the question whether, for the purposes of determining the application of exemption provisions, a transaction should be construed as comprising one supply, or more than one supply. The GST Act does not preclude treating the elements of a transaction as part of a single supply (see s 9-10(2)(h)), but the question whether such treatment is appropriate is irrelevant to the issues in this appeal.

2 Section 9-15(1): "*Consideration* includes (a) any payment ... in connection with a supply of anything; and (b) any payment ... in response to or for the inducement of a supply of anything." It is not limited to consideration for a supply, nor to contractual consideration.

3 The other requirements for the supply to be a taxable supply, and so for s 29-5 to apply, were met in the context of this appeal.

7. While there was no supply of a flight in connection with the unused fares, there was a supply of contractual rights, and of obligations and services. It was that supply which entitled Qantas to retain the unused fares.[4]

8. A related and also misdirected submission is that directed to wholly executory contracts ("exchange of" or "mutual" promises). The contracts here in contest were not wholly executory. The customers paid the unused fares to Qantas. For their payments, they were supplied with rights, obligations and services, including the right to be carried to their destination (albeit conditional, and possibly not on the flight of their choosing). Moreover, Qantas did all that it promised to do: it made the reservation and held itself ready to provide the seat on the flight.[5]

9. That an event comprises the making of a contract does not preclude it from also comprising a supply for GST purposes.[6] The judgment of this Court in *FC of T v Reliance Carpet Co Pty Ltd*[7] establishes that the creation of contractual rights on formation of a contract comprises a "supply." It is not to the point (even if it were correct[8]) that the "reservation" is part of the making, or is evidence, of the contract; it is also a supply of rights, obligations and services.

The statutory language is the paramount consideration

10. Resolution of the issues in the present appeal turns not on the approach adopted in other "GST/VAT systems,"[9] but upon the language of the GST Act. Apart from an attempt to

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4 No distinction is to be drawn for assessment purposes between unused fares which were refunded in later tax periods (giving rise to an adjustment under Division 19) and those which were never refunded; all were consideration received for taxable supplies attributable to the assessed tax period. It is likely that fares refunded in the tax period of receipt were excluded from the amounts returned, but Qantas led no evidence on this point.

5 There is no relevant resemblance between this case and the "entire contract" spoken of in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 350. Here Qantas as supplier partially performed the contract by making the reservation and setting aside the seat. This case more resembles *CEC v Bass plc* [1993] BVC 34, discussed at AB205.40 [25].

6 Many provisions of the GST Act proceed on the premise that there may be a supply by creation or conferral of a right (eg, under a contract or option), and a subsequent supply of performance in discharge of that right (see, for example, ss 9-15(3)(a), 9-25(5), 9-30(1)(b), 9-30(2)(b), 38-190(2), 99-5(1) and 100-5). The Act does not attribute different characters to supply of the obligation and to that of performance. Notably, the Act contains no provision that a supply of rights for consideration is to be disregarded because the rights are not later discharged by performance; but that is the essence of the Qantas case.

7 (2008) 236 CLR 342, 348 [13], 352 [28].

8 The "reservation" or "booking" comprises not merely making the contract, but entering the customer into the reservation system, and "reserving" – or withdrawing from available flight seats – the passage booked.

9 Qantas' submissions ("QS") at [12].

dismiss them as "accounting technicalities,"[10] Qantas' submissions make no attempt to address the provisions by which the "net amounts" assessed are fixed.

11. For the reasons given in the Commissioner's submissions in chief, application of those provisions to the undisputed facts supports the assessments made.

Other matters raised in Qantas' submissions

Apportionment

12. An "appeal" from the Tribunal lies only on a question of law, and it is that question (not the correctness of the Tribunal's decision) which is the matter before the Court.[11] No evidence was led in support of, or which would have permitted, an apportionment of the unused fare to different supplies made by Qantas, and there was no error of law in not making an apportionment.

13. In any event the notion of apportioning part of the unused fare to a flight not taken is incoherent. Clearly a flight not supplied is not the supply for which the unused fare is consideration: there was no such supply. But the unused fare was not paid for nothing. Qantas did not acknowledge a total failure of consideration and return the unused fare: to the contrary it retained it. The unused fare was paid in connection with a supply of what the customer obtained: the reservation and the conditional right to take the flight.

Attribution is not a "new case"

14. The contention that "the issue of attribution [is raised] for the first time in this Court" (QS34) manifests a misconception of the statutory scheme and the role of Division 29 in the Commissioner's case. Division 29 is an integral part of the calculation of the assessed net amounts objected to: it attributes the taxable supplies to the period in which consideration is first received or invoiced. In the present appeal there is not, and never has been, any question as to the relevant period, which is that in which the unused fares were received. No "evidential enquiry" is or could have been possible.

15. The notion of a "provisional" attribution (QS54) is misconceived. The liability to pay GST is determined at the end of the relevant tax period, on the facts as they then are. If there is a subsequent change in circumstances (such as a substitution of an international for a domestic flight, or a refund) there may be an adjustment under Division 19 in

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[10] Qantas' submissions at [26], [28].

[11] *TNT Skypak International (Aust) Pty Ltd v FC of T* (1988) 82 ALR 175 at 187; *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* (2010) 241 CLR 390 at [33].

respect of the net amount of the period in which the subsequent event occurs,[12] but the liability to pay GST in respect of a past tax period is not changed by a subsequent event.

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[12] No evidence was led which would found any adjustment in the net amounts assessed in this case, nor did the grounds of objection (AB33-36) extend to a claim for adjustment.