COMMISSIONER OF TAXATION v MBI PROPERTIES PTY LTD (S90/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2013] FCAFC 112

Date of judgment: 18 October 2013

Special leave granted: 11 April 2014

In September 2006 South Steyne Hotel Pty Ltd ("South Steyne"), which owned strata-titled apartments comprising the guest rooms of a hotel, leased each of those apartments to Mirvac Management Pty Ltd ("Mirvac"). South Steyne then sold some of the apartments to investors. The Respondent ("MBI") purchased three of those apartments, which remained subject to the leases to Mirvac. MBI intended that those leases be continued.

The Appellant ("the Commissioner") assessed MBI for tax in relation to its three apartments, making an adjustment under s 135-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act") for the supply of a going concern. Section 135-5(1) relevantly provides that there is an "increasing adjustment" for the recipient of a supply of a going concern who intends that at least some of the supplies to their enterprise will be neither taxable supplies nor GST-free supplies. After MBI's objection was disallowed by the Commissioner, MBI appealed to the Federal Court.

Previous Federal Court proceedings had determined that: (1) South Steyne's lease of the apartments to Mirvac was an input-taxed supply under s 40-35 of the GST Act; (2) South Steyne's sale of the apartments to MBI constituted the supply of a going concern (which was thus GST-free); and (3) the continuation of the leases to Mirvac did not constitute a further supply by MBI for GST purposes.

On 6 February 2013 Justice Griffiths dismissed MBI's application, finding MBI liable for an increasing adjustment of its tax liability under s 135-5 of the GST Act. His Honour held that, although the leases were a supply made initially by another entity (South Steyne), the continuation of those leases constituted a continuing supply made with intent "through the enterprise" conducted by MBI.

On 18 October 2013 the Full Court of the Federal Court (Edmonds, Farrell & Davies JJ) unanimously allowed MBI's appeal. Their Honours held that the only supply was the *grant* of the leases, which was completed upon their coming into existence. As MBI had not made that supply, it was not liable for an increasing adjustment under s 135-5.

The grounds of appeal include:

- The Full Court erred in finding that MBI did not have an "increasing adjustment" under s 135-5 of the GST Act in relation to the enterprise it acquired from South Steyne because MBI did not intend that any input-taxed supply of residential premises would be made by it through the enterprise.

On 28 April 2014 MBI filed a notice of contention, the ground of which is:

- If, contrary to the conclusion of the Full Federal Court in *South Steyne Hotel Pty Ltd v Commissioner of Taxation* (2009) 180 FCR 409, MBI intended to make a supply or supplies through the enterprise it acquired from South Steyne, there was no price for that supply or those supplies with the consequence that, applying s 135-5(2) of the GST Act, there was no increasing adjustment.