HIGH COURT OF AUSTRALIA

16 October 2019

COMMISSIONER OF TAXATION v SHARPCAN PTY LTD
[2019] HCA 36

Today the High Court unanimously allowed an appeal from a judgment of the Full Court of the Federal Court of Australia concerning the deductibility under the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act") of payments to acquire gaming machine entitlements ("GMEs") under the *Gambling Regulation Act 2003* (Vic).

Spazor Pty Ltd ("the Trustee"), as trustee of a trust of which the respondent was the beneficiary, purchased a hotel business. The Trustee did not purchase the 18 gaming machines at the premises but, in accordance with the purchase agreement, was paid a percentage of the income derived by the owner of the machines, an authorised gaming operator under the *Gambling Regulation Act*. After that Act was amended to provide for GMEs to be put up for auction and allocated directly to gaming venue operators, the Trustee bid for, and was allocated, 18 GMEs, each permitting it to operate a gaming machine for ten years, and each being capable of sale and transfer to other venue operators, subject to approvals. To fund the purchase price of $600,300, the Trustee entered an agreement with the Minister for Gaming providing for deferred payment by instalments and forfeiture in default of payment. After payment, the Trustee claimed the purchase price as a deduction under s 8-1 of the 1997 Act or one-fifth of that price under s 40-880 of the 1997 Act. The appellant Commissioner disallowed both claims.

On review, that decision was set aside by the Administrative Appeals Tribunal, which held that the purchase price was not an outgoing of a capital nature and was therefore deductible under s 8-1 of the 1997 Act. In dismissing an appeal by the Commissioner, a majority of the Full Court held that the outgoing was not on capital account because: (i) it had to be recouped out of every day's trading across the business; (ii) it reflected the economic value of the income stream expected from using the gaming machines which the GMEs permitted; (iii) it was incurred in relation to an integrated hotel business; and (iv) the Trustee, confronted with changed circumstances from government intervention by the amendment of the *Gambling Regulation Act*, had to respond to the possible loss of gaming revenue. Alternatively, the majority reasoned that one-fifth of the purchase price would have been deductible under s 40-880 because the purpose of the expenditure was to preserve the goodwill of the hotel business and the value to the Trustee of the GMEs was solely attributable to their effect on the goodwill of the business.

The High Court unanimously held that the GMEs were assets of enduring value acquired by the Trustee as the means of production, necessary for the structure of the business, and a barrier to entry, and that the four factors identified by the Full Court were not to the point. The Court therefore held that the purchase price, although paid in instalments, was in the nature of a once-and-for-all outgoing for the acquisition of a capital asset, and thus not deductible under s 8-1 of the 1997 Act. The Court further held that the evidence did not establish that the subjective or objective purpose of purchasing the GMEs was to preserve but not enhance the goodwill of the hotel business, and that the value of the GMEs was not solely attributable to their effect on goodwill, but resided in their capacity to generate gaming income and to be sold and transferred. The Court therefore held that no deduction under s 40-880 of the 1997 Act was permitted.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*