

BETWEEN:

COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA

Appellant

and

SHARPCAN PTY LTD  
Respondent



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APPELLANT'S REPLY

**Part I: CERTIFICATION**

1. I certify that this submission is in a form suitable for publication on the internet.

**Part II: CONCISE REPLY**

**Section 8-1**

- 20 2. The Respondent incorrectly asserts that from a “practical and business point of view, the character of the advantage sought was to be able to continue lawfully to conduct its business, to maintain its existing customer base and the revenues derived from those customers.”<sup>1</sup> What the expenditure was calculated to achieve is revealed by the immediate purpose and effect of the expenditure, namely the acquisition of the GMEs that were required by the Trustee to conduct gaming as part of its hotel business after August 2012. From a business and practical point of view, the advantage sought and achieved by the GME Expenditure was the Trustee’s acquisition of the GMEs and the statutory entitlements they conferred.<sup>2</sup> The Respondent’s submission to the contrary impermissibly ignores the acquisition achieved by the expenditure and the  
30 nature of the legal rights which the acquisition conferred on the Trustee.<sup>3</sup>
3. The GMEs were assets of the Trustee and were components of the profit-making structure of its business. The Trustee acquired the GMEs and held and enjoyed them for the right to conduct gaming which they authorised. They were not acquired for

<sup>1</sup> Respondent’s Submissions (RS), [26], [29].

<sup>2</sup> Cf *AusNet Transmission Group v Federal Commissioner of Taxation* (2015) 255 CLR 439 at [60], [66].

<sup>3</sup> *Commissioner of Taxation v South Australian Battery Makers Proprietary Limited* (1978) 140 CLR 645 at 662; *AusNet Transmission Group v Federal Commissioner of Taxation* (2015) 255 CLR 439 at [74]-[77].

any purpose of resale or trade in GMEs. Nor were they acquired or held for, or as part of, any marketing operations of the Trustee. Their acquisition was an affair of capital.<sup>4</sup>

4. The Respondent incorrectly contends that “the [legislative] change did not alter in any “practical way” the nature or composition of the Trustee’s business, or the manner in which its revenues were derived.”<sup>5</sup> To the contrary, after August 2012, it and not Tattersalls Gaming Pty Ltd (**Tattersalls**) conducted the gaming at its hotel. In contrast to the period when Tattersalls held the gaming operator’s licence, after August 2012 all of the revenue from the gaming conducted at the Royal Hotel was derived by the Trustee and all of the expenses associated with the ongoing conduct of the gaming and the related compliance activities, including the monthly payments of tax to the Victorian Commission for Gambling Regulation, was the responsibility of the Trustee.<sup>6</sup>

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5. The Respondent’s reference to *Hallstroms Pty Ltd v Commissioner of Taxation*<sup>7</sup> and *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation*<sup>8</sup> does not assist it. The expenditure in question in those cases was not incurred for the acquisition of an asset. The legal costs in the *Hallstroms* case were incurred for the maintenance of what was already in existence and enjoyed by the taxpayer and, in the *Magna Alloys* case, were directed at vindicating existing business methods of the taxpayer.<sup>9</sup> The facts of the present case are materially different. The GME Expenditure was incurred for the acquisition of the GMEs and the statutory entitlements they conferred, which the Trustee did not otherwise hold and without which it could not conduct gaming after August 2012. In contrast to the facts in *Hallstroms* and *Magna Alloys*, the GME Expenditure was “made for the purpose of acquiring an asset [and] of adding to the profit-yielding subject which constituted the capital of the business”.<sup>10</sup>

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6. For the reasons stated in AS [31] the Respondent’s reliance<sup>11</sup> upon *BP Australia v*

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<sup>4</sup> Appellant’s Submissions (AS), [21]-[24], [27], [28]; cf *AusNet Transmission Group v Federal Commissioner of Taxation* (2015) 255 CLR 439 at [18]-[29], [66], [75].

<sup>5</sup> RS, [27], [32].

<sup>6</sup> AS, [9], [13].

<sup>7</sup> (1946) 72 CLR 634 at 641; RS, [24(e)], [27].

<sup>8</sup> (1980) 33 ALR 213; RS, [28].

<sup>9</sup> *Hallstroms Pty Ltd v Commissioner of Taxation* (1946) 72 CLR 634 at 641-2 per Latham CJ; 644-5 per Starke J, 655 per Williams J; *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213 at 229 per Brennan J, 239 per Deane and Fisher JJ.

<sup>10</sup> *Hallstroms Pty Ltd v Commissioner of Taxation* (1946) 72 CLR 634 at 641 per Latham CJ.

<sup>11</sup> RS, [30].

*Commissioner of Taxation*<sup>12</sup> is erroneous. Further, the Respondent's contention that "the Trustee's "real object" was not the GME's as assets in themselves, but the removal of a legislative obstacle to its continued lawful operation of gaming"<sup>13</sup> incorrectly ignores the legislative changes to the regulation of the gaming industry, their impact upon the Trustee, and the rights conferred by the GMEs. In order to conduct gaming after August 2012 the Trustee was required to hold GMEs allocated under *The Gambling Regulation Act 2003* (Vic). The GME Expenditure secured for the Trustee the acquisition of the requisite GMEs. They conferred on the Trustee the lawful authority which it did not otherwise have to conduct gaming on gaming machines. The GMEs were held and enjoyed by the Trustee for the statutory entitlements they conferred.

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7. The Respondent's contention that the GMEs did not provide an enduring benefit to the Trustee<sup>14</sup> is incorrect. The right to conduct gaming which the GMEs authorise subsists for the term of the GMEs, being 10 years subject to extension. The benefit which the acquisition of the GMEs secured endures for the whole of that period. In *Sun Newspapers Limited v Commissioner of Taxation*<sup>15</sup> Latham CJ stated: "When the words "permanent" or "enduring" are used in this connection it is not meant that the advantage which will be obtained will last forever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole".<sup>16</sup> The GME Expenditure was "expenditure for the benefit of the business as a whole". It was not recurrent expenditure producing an annual benefit for the Trustee, in contrast to the concession fees considered in *Commissioner of Taxation v Citylink Melbourne Limited*.<sup>17</sup>

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#### **Section 40-880**

##### ***Expenditure you incur to preserve (but not enhance) the value of goodwill***

8. Contrary to the Respondent's submissions,<sup>18</sup> a consideration of the effect of the expenditure is not extraneous to the application of section 40-880(6). The inquiry into the actual purpose of the person making the expenditure involves an assessment of the person's evidence having regard to the objective circumstances, including the

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<sup>12</sup> (1965) 112 CLR 386.

<sup>13</sup> RS, [30]

<sup>14</sup> RS, [24(d)], [31].

<sup>15</sup> (1939) 61 CLR 337 at 355 per Latham CJ.

<sup>16</sup> See also *Herring v FCT* (1946) 72 CLR 543 at 547 per Rich J.

<sup>17</sup> (2006) 228 CLR 1 at 42 [142] per Crennan J; cf. RS, [24(d)].

<sup>18</sup> RS, [37(c)].

effect and consequences of the expenditure.<sup>19</sup> In this case, what was achieved by the expenditure was the acquisition of the GMEs and the resultant statutory authority to conduct gaming for a period of 10 years after 2012.<sup>20</sup> That effect informs the purpose of the expenditure. The Trustee incurred the expenditure to acquire the GMEs and the authority to conduct gaming for a period of 10 years.<sup>21</sup> For the reasons stated in the Appellant's submissions, that purpose was not a purpose to which section 40-880(6) is directed.<sup>22</sup>

9. The Respondent erroneously states the purpose of the GME Expenditure was to enable it to continue to conduct gaming,<sup>23</sup> when in fact the Trustee did not previously itself conduct or have a right to conduct gaming, but rather was the recipient of commissions from Tattersalls in respect of gaming conducted by Tattersalls at the Royal Hotel.<sup>24</sup>
10. The Respondent incorrectly contends that "the maintenance of custom is necessarily reflected in the maintenance of trading income."<sup>25</sup> Custom and trading income are separate and distinct concepts. They are not wholly inter-dependent, and they are not necessarily responsive to the same factors. The maintenance of one is not necessarily reflected in the maintenance of the other. The Respondent's submissions involve a misconception as to the nature of goodwill, custom and trading income.<sup>26</sup>
11. The Respondent incorrectly submits that the Administrative Appeals Tribunal found that the purpose of the expenditure was simply to preserve the value of goodwill.<sup>27</sup> On a proper reading of the Tribunal Reasons at [26]-[27] [AB23]-[AB24], the Tribunal found that the GME Expenditure was incurred not only to preserve goodwill, but also to enhance it. At the commencement of Tribunal Reasons [27] [AB23] the Tribunal noted that the relevant test is whether the expenditure was "to enhance goodwill" and it was for the purpose of that test that the Tribunal made the finding that the expenditure enhanced the value of the goodwill.<sup>28</sup>
12. The Respondent contends the goodwill of the business would have been adversely

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<sup>19</sup> AS, [49]; also *Pascoe v Federal Commissioner of Taxation* (1956) 30 ALJR 402 at 403, per Fullagar J.

<sup>20</sup> AS, [46]-[57].

<sup>21</sup> AS, [57].

<sup>22</sup> AS, [41]-[44], [54], [55].

<sup>23</sup> RS, [19].

<sup>24</sup> AS, [9], [13].

<sup>25</sup> RS, [37(c)].

<sup>26</sup> AS, [42]-[44].

<sup>27</sup> RS, [38]-[39].

<sup>28</sup> Tribunal Reasons, [27] [AB24]; also *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-2.

affected if the Trustee had not incurred the GME Expenditure.<sup>29</sup> However, that fact alone, even if it were correct, would not itself satisfy the requirement in section 40-880(6) that the expenditure be “to preserve (but not enhance) the value of goodwill”. That requirement is concerned with the purpose of incurring the expenditure and it is not met when the purpose is, as it is in this case, to acquire the statutory authority necessary to engage in gaming for reward.<sup>30</sup> The reference by the Respondent to preventing a reduction in the Trustee’s earning capacity does not assist it.<sup>31</sup> Goodwill, with which section 40-880(6) is concerned, is not the same thing as earning capacity. Further, for the reasons stated above,<sup>32</sup> the Respondent’s contention that the Trustee was able to continue to conduct its business after 15 August 2012 in “substantially the same manner and by substantially the same means” as it had prior to that date<sup>33</sup> is incorrect.

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*Value of the right is solely attributable to the effect that the right has on goodwill*

13. The Respondent’s contention<sup>34</sup> that “[I]ike “trading income”, the “income stream” is derived from the earning capacity of the business, which is attributable to the attraction of custom” is incorrect.<sup>35</sup> The earning capacity of a business consists of many components, of which goodwill may or may not be one. In the present case, the value of the GMEs to the Trustee includes at the very least the income stream derived by it from the conduct of gaming which the GMEs authorise. The generation of income from the conduct of gaming is separate and distinct from whatever effect the GMEs may have had, if any, on the goodwill. The requirement that the value to the Trustee of the GMEs be solely attributable to the effect they had on goodwill is not satisfied.

Dated: 26 June 2019



G J DAVIES  
J E JAQUES  
L J S MOLESWORTH

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<sup>29</sup> RS, [40].

<sup>30</sup> AS, [41]-[44], [54], [55].

<sup>31</sup> RS, [40].

<sup>32</sup> Par [4] above.

<sup>33</sup> RS, [40].

<sup>34</sup> RS, [43]

<sup>35</sup> AS, [41]-[43], [60]-[64]