HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **AUTOMOTIVE INVEST PTY LIMITED**
Appellant

and

COMMISSIONER OF TAXATION
Respondent

APPELLANT'S REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.[1]

Part II: Argument

Paragraphs 15-30(3)(c) and 15-35(3)(c) do not provide for a "sole purpose test"

2. Central to the Respondent's Submissions ("RS") is the contention that paras 15-30(3)(c) and 15-35(3)(c) provide a "sole purpose test" with the result that "any purpose in addition to a quotable purpose causes the increasing adjustment to occur" (RS [41]; see also, RS [28], [46], [51], [67]).

3. In response to this assertion the Appellant relies upon its submissions in AS [32], [33] and [75]. It is of the essence of the Appellant's submissions that the policy or plan of the LCTA does not contemplate that an increasing adjustment should occur where that vehicle remains – at all times – trading stock – see *Genex Corporation Pty Ltd v Commonwealth* (1991) 30 FCR 193 at 207[2], *cf*, RS [62], FFC [35].

4. The "natural meaning" (RS [51]) of the text in paras 15-30(3)(c) and 15-35(3)(c) admits of constructional choices. The Respondent's "sole purpose test" is not one of them and may, in fact, be contrasted with the express use of the words "sole purpose" in sub-para 7-

[1] The abbreviations used in the Appellant's Submissions filed 1 February 2024 ("AS") are continued in this reply.
[2] Per Hill J (with whom Beaumont and Burchett JJ agreed), cited with approval by this Court in *Commonwealth v Genex Corporation Pty Ltd* (1992) 176 CLR 277 at 295 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

10(3)(ba)(iii) which was inserted into the LCTA by the *Tax and Superannuation Laws Amendment (2016 Measures No 2) Act 2017* (Cth) ("the Amending Act").

5. That amendment took effect from 28 February 2017 (during the period under consideration). The amendment provided relief from luxury car tax for certain public institutions (including public museums) that import and acquire luxury cars for the "sole purpose of public display". The Amending Act also made a consequent amendment to Subdivision 15-B.[3]

6. Not only does this amendment demonstrate that when Parliament wants there to be a "sole purpose" test it says so, but it is clear from the Explanatory Memorandum for the *Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill 2016* that ancillary uses are not disqualifying uses even when the language of "sole purpose" is employed (see, [3.14], [3.35]-[3.36], [3.54]-[3.57]).

7. The Respondent's submission that paras 15-30(3)(c) and 15-35(3)(c) "do not provide for … an incidental, subservient and/or not inconsistent purpose" and instead provide a "sole purpose test" should accordingly also be rejected (RS [18]). The same can be said of s 9-5, upon which the operation of s 69-10 of the GST Act hinges. If the "sole purpose test" advanced by the Respondent was correct, then there would be no need for the specific exclusion in para 9-5(1)(a) for hiring or leasing – each being a clear example of an additional use (*cf*, RS [51], [65(c)]).

8. On the Appellant's construction, the intended taxing point under the LCTA will in all cases be reached with respect to each Assessed Car (*cf*, RS [55]) – that is because each Assessed Car remained, at all times, trading stock. That a car remained trading stock meant that a sale of it within the 2 year period would give rise to liability to luxury car tax because the taxing point was reached. This would be so notwithstanding any additional or incidental use to which it might have been put between quotation and the end of the 2 year period.

9. Notwithstanding the Respondent's attempt to deny it, the LCTA is a particular type of sales tax legislation (FFC [28]). The LCTA, as part of the "new tax system", is intended to be a "practical business tax", the burden of which is designed to fall upon the final retail sale (ss 2-5, 9-1).[4]

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[3] See, paras 15-30(1A), (3A), (3B); 15-35(3A), (3B).

[4] In the context of the former Sales Tax regime: see, *FCT v Pacific Dunlop Ltd* (1999) 87 FCR 253 at 267 [64] (Hill, Sundberg and Goldberg JJ) where their Honours stated "[i]n our view the legislation should be interpreted commercially — it is, after all, legislation peculiarly directed to commerce". In relation to GST: see, *Sterling Guardian Pty Ltd v FCT* (2005) 60 ATR 502 at 514 [39] (Stone J); *Saga Holidays Ltd v FCT* (2006) 156 FCR

10. As to RS [57]-[58], in the ordinary case, there will only ever be a single taxing point where wholesalers and dealers quote on successive supplies until the final retail sale.[5] Conversely, there may be cascading tax on taxable supplies of a luxury car if a dealer does not quote in acquiring a luxury car (and pays luxury car tax) before the final retail sale (where luxury car tax is imposed again) (the situation to which sub-ss 5-15(2) and (3) are directed).

11. Approaching the LCTA from a "practical and business point of view"[6] means that a car dealer must as the person carrying on the business be able to know when liability to the tax will, or will not, be incurred. The Respondent's submissions that demonstrator vehicles "would need to be examined" and that the creation of a security interest in a car would depend "on the facts" would be of no assistance to the person carrying on the business and, indeed, is of no assistance to the Court (RS [64]).

12. The Respondent has not addressed how the definition of "quotable purpose" (s 27-1) is to be imported into paras 15-30(3)(c) and 15-35(3)(c) (*cf,* AS [50]). The question is not whether one is permitted to "decouple" sub-s 9-5(1) from paras 15-30(3)(c) and 15-35(3)(c) (*cf,* RS [49]). It is about how one reads "quotable purpose" into paras 15-30(3)(c) and 15-35(3)(c). On a plain reading of the s 27-1 definition of "quotable purpose" there is no scope to import the words of the chapeau in sub-s 9-5(1). The Appellant's approach accords with earlier guidance of this Court (AS [43], [50]-[52]).

13. As to the risk of effective "double taxation", the Respondent advances sub-ss 5-15(2) and (3) as "ensur[ing] that double taxation cannot occur" (RS [17], [60]). With respect, these provisions no more "ensure" against effective "double taxation" than did the *Sales Tax Regulations* considered by this Court in *Ellis & Clark*.[7] The circumstances of this case make that clear as it was not until the Respondent served notice of the amended assessments on the Appellant that the tax became payable in respect of the increasing adjustments.[8] On any reading of sub-s 5-15(2) and (3) no refund is available to the Appellant in those cases where an Assessed Car was sold within the 2 year period.[9]

14. Starke J's observation in *Ellis & Clark* at 88 is, with respect, apposite. The effect of the Respondent's argument is to permit, rather than obviate, the possibility of double taxation.

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256 at 264 [29] (Stone J). See also, Hill J writing extra-judicially: "Some Thoughts on the Principles Applicable to the Interpretation of the GST" (2003) 6(1) Journal of Australian Taxation 1, Part 6 "The need for a practical – business interpretation".

[5] See, *HP Mercantile Pty Ltd v FCT* (2005) 143 FCR 553 at 557 [10]-[11] (Hill J); *cf* s 2-1.

[6] *Travelex Ltd v FCT* (2010) 241 CLR 510 at 519 [24] (French CJ and Hayne J).

[7] *DFCT v Ellis & Clark Ltd* (1934) 52 CLR 85 at 88 (Starke J) and 95 (Dixon J).

[8] *FCT v H* (2010) 188 FCR 440 at 444 [15]-[16] (Downes, Edmonds and Greenwood JJ).

[9] There were six such Assessed Cars (AS [30]).

His Honour made this observation even though regs 46 and 47 of the *Sales Tax Regulations* existed to alleviate double taxation. The Appellant's construction on the other hand avoids double taxation and is for this reason alone, to be preferred. The Appellant's construction is also consistent with the text and policy or plan of the LCTA.

15. The Respondent's submission at RS [61] highlights the extreme outcome if a literal construction of the LCTA is preferred to a contextual one. The Respondent accepts – as he must – that the supply of a luxury car is "only taxable if ... the car is 'not more than 2 years old'". Therefore, the sale of a car that is 3 years old will not give rise to any luxury car tax liability under the LCTA. That is because, once the taxing point is passed no tax is payable on a subsequent sale. However, if the same 3-year-old car were applied to personal use, rather than sold, after the taxing point had passed the Respondent contends that luxury car tax would be payable because "ceas[ing] to hold a car as trading stock outside the two-year period would still be subject to an adjustment" (RS [61(b)]). Such a result is plainly incongruous. The Appellant's contextual construction, on the other hand, reads both Subdivisions 15-A and 15-B so that they operate temporally, as intended, and avoids the incongruity which flows from the Respondent's literal construction.

Reply to the Respondent's factual submissions

16. What are asserted to be "factual matters" raised by the Respondent (primarily at RS [73]-[92]) can have no impact upon the concise issues raised by the Appellant (AS [2]). The necessary facts for the determination of those issues are set out by the Appellant in AS [7]-[26].

17. The Respondent glides over the fact that all cars, including each Assessed Car, were, at all relevant times, treated both by him and the Appellant as trading stock of the business of the Appellant for both LCTA and income tax purposes.[10] The uncontested evidence was that all cars were for sale when saleable. Mr Denny made clear the circumstances where a particular car might not be available for purchase, and that all cars able to be sold were for sale (AS [18]).

18. The Appellant's case is simple – (i) each car was trading stock of the business of the Appellant and, if fit for sale, was for sale at all relevant times, (ii) each car was displayed in what were its licensed motor dealer's premises and cars were advertised for sale online, (iii) there was a sales office and there were salespersons in the premises from the

[10] See, in this regard, Division 70 of the *Income Tax Assessment Act 1997* (Cth); R W Parsons, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* at paras [14.7]-[14.8].

commencement date, (iv) while admission was charged, it was for permission to enter the premises – no admission fee was tied to any particular car (and the LCTA must be considered by reference to each car individually), (v) the premises were marketed as a "museum" to get people in to possibly purchase or tell others about the cars, and (vi) approximately $28 million worth of cars were sold in the year ended 30 June 2017 alone. Admission fees to the premises, were, by comparison, $1.32 million – and on the unchallenged evidence, did not exceed the costs.

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ANNEXURE TO THE APPELLANT'S REPLY

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the particular statutes and statutory instruments:

- *A New Tax System (Luxury Car Tax) Act 1999* (Cth) – historical version (effective from 28 February 2017 to 30 September 2019).
- *Tax and Superannuation Laws Amendment (2016 Measures No 2) Act 2017* (Cth).
- *Sales Tax Regulations* (Cth) (*Statutory Rules 1930 (No 156)*) – historical version (effective 19 December 1930 to 28 May 1931).
- *Sales Tax Regulations (Amendment)* (Cth) (*Statutory Rules 1932 (No 79)*) – historical version (effective 4 August 1932 to 1 August 1956).
- *Sales Tax Regulations (Amendment)* (Cth) (*Statutory Rules 1932 (No 144)*) – historical version (effective 9 December 1932 to 1 August 1956).