

**AUSNET TRANSMISSION GROUP PTY LTD v COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA (M139/2014)**

Court appealed from: Full Court, Federal Court of Australia
[2014] FCAFC 36

Date of judgment: 7 April 2014

Date special leave granted: 12 December 2014

In August 1993, the Victorian Government announced its intention to disaggregate the State owned electricity commission into three new operating businesses each of which would respectively undertake the generation, transmission and distribution of electricity. In October 1993, National Electricity, which was later known as PowerNet Victoria ('PNV'), was established as a State body, but in April 1997 the Government announced its intention to privatise the business of PNV. On 12 October 1997 an asset sale agreement was executed between PNV and the appellant ('Ausnet'). On 28 October 1997, the Governor in Council made an order under s 163AA of the *Electricity Industry Act 1993 (Vic)* ('EIA') declaring that the holder of the Transmission Licence would pay imposts to the Treasurer totalling \$177,500,000 for the period to 31 December 2000. Ausnet paid the imposts and claimed them as deductions under s 8-1(1) of the *Income Tax Assessment Act 1997 (Cth)*. The respondent disallowed the deductions.

The primary judge (Gordon J) rejected Ausnet's claim on the basis that the s 163AA imposts were not a cost of Ausnet deriving its income, but were payments out of Ausnet's profits after the calculation of Ausnet's taxable income. Her Honour also concluded that if it were necessary to decide, the payments were outgoings of capital, or of a capital nature.

The appellant's appeal to the Full Federal Court of Appeal (Edmonds and McKerracher JJ, Davies J dissenting) was unsuccessful. The majority of the Court held that the s 163AA imposts were outgoings of capital, or of a capital nature, because they were part of the cost (to Ausnet) of acquiring the assets of the business, specifically, the Transmission Licence, which was unarguably a capital asset. Critically, the transfer of the Transmission Licence to Ausnet carried with it the s 163AA liability of PNV; equally critically, the s 163AA impost was not made on Ausnet post the transfer of the Transmission Licence. It was assumed by Ausnet on the transfer of the Transmission Licence, not by Order under s 163AA, and as such, formed as much part of the cost of acquisition of the assets as the total purchase price. The majority disagreed with the primary judge regarding the application of the first limb of s 8-1, however. They found that the imposts were incurred by Ausnet in relation to carrying on its business for the purpose of gaining or producing assessable income. There was sufficient nexus between the expenditure and Ausnet's income producing operations and activities.

Davies J (dissenting) noted that the obligation to pay the imposts flowed as a necessary consequence of holding the licence, so that the thing that produced the assessable income was the thing that exposed Ausnet to the liability discharged by the expenditure. The imposts were therefore to be seen as an expense in the business operations of Ausnet and on revenue account rather than as a cost in securing the right to conduct the transmission business.

The grounds of appeal include:

- The majority of the Full Court erred:
 - (a) in deciding that the impost formed part of the consideration for the acquisition by the appellant of the transmission assets of PowerNet Victoria under the asset sale agreement;
 - (b) in deciding that the liability to pay it arose from the asset sale agreement;
 - (c) in not, in any event, deciding in accordance with the reasoning of the majority of this Court in *Cliffs International Inc v Federal Commissioner of Taxation* (1979) 142 CLR 140, that when each impost was paid, it was no more than a business expense, regularly incurred, which secured no additional benefit or advantage to the appellant.

The respondent has filed a Notice of Contention on the ground that the Full Court erred in failing to find that the payments made to the State of Victoria in the 1999 to 2001 years of income under s 163AA(1) of the *Electricity Industry Act 1993* (Vic) did not satisfy the requirements of s 8-1(1) of the *Income Tax Assessment Act 1997* (Cth).