

BETWEEN:

COMMISSIONER OF TAXATION  
Appellant



and

MBI PROPERTIES PTY LTD  
Respondent

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**APPELLANT'S SUBMISSIONS**

***Part I: Publication***

1. The Appellant certifies that these submissions are in a form suitable for publication on the internet.

***Part II: Issues***

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2. The principal issue in the appeal is whether the purchaser of the reversionary estate in land leased to a sitting tenant makes a "supply" (as defined in *A New Tax System (Goods and Services Tax) Act 1999*, "the GST Act") to the tenant during the currency of the lease after completion of the purchase.
  3. A second issue raised by the Respondent by way of Notice of Contention is whether  
20 there was a "price" for the supply made to the sitting tenant for the purpose of the calculation of the s 135-5(2) increasing adjustment (to which the Respondent was assessed).

***Part III: Judiciary Act 1903***

4. The Appellant certifies that he considers that notice is not required pursuant to s 78B of  
25 the *Judiciary Act 1903*.

**Part IV: Reports of reasons**

5. The judgment of the Full Court of the Federal Court of Australia ([2013] FCAFC 112) is reported as *MBI Properties Pty Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 65, and also as 2013 ATC ¶20-420.

5 6. The decision of Griffiths J at first instance ([2013] FCA 56) is reported as *MBI Properties Pty Ltd v Commissioner of Taxation* 2013 ATC ¶20-372.

**Part V: Relevant facts**

7. The material facts were and are uncontested, and are set out in the reasons of Edmonds J at [5]. Succinctly stated, the essential facts are:

10 (a) In December 2000 South Steyne Hotel Pty Ltd (“South Steyne”) purchased the hotel known as the Sebel Manly Beach Hotel;

(b) On 10 August 2006 a plan of strata subdivision was registered, dividing the hotel into (inter alia) 83 strata lots each comprising an apartment;

15 (c) On 29 September 2006 South Steyne leased each of the apartment lots to Mirvac, under a lease which obliged Mirvac to operate a scheme (“the Mirvac scheme”) whereby the apartment was, together with the other apartments, operated as part of a serviced apartment business;

20 (d) On 31 October 2007 South Steyne sold 3 apartment lots to the Respondent (“MBI”) subject to the leases to Mirvac. MBI elected to participate in the Mirvac scheme and undertook to execute a deed of acknowledgement of lease with Mirvac acknowledging that it took “subject to the lease” and agreed “to comply with all the obligations of the landlord in the lease.”<sup>1</sup>

25 (e) MBI made application to the Federal Court, in proceedings to which the Appellant was joined, for a declaration that the supply made by it to Mirvac was not input taxed. Stone J held that there was an input taxed supply, and refused to make the declaration.<sup>2</sup>

(f) MBI appealed to the Full Court, which dismissed the appeal. Although there was “... no dispute between the parties that the purchase of the reversionary interest

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<sup>1</sup> AB

<sup>2</sup> *South Steyne Hotel Pty Ltd v FC of T* (2009) 71 ATR 238, 246 [71], 248 [79].

in the apartments by MBI effected a 'supply' by MBI in favour of [Mirvac]"<sup>3</sup> each member of the Full Court held that there was no supply by MBI to Mirvac, and dismissed the appeal.<sup>4</sup>

5 (g) In the same proceedings, the Full Court held that the apartment lots were "residential premises" for GST purposes,<sup>5</sup> and that the sale of the apartment lots to MBI was GST-free as the supply of a going concern.<sup>6</sup>

8. The Court having held that the acquisition of the reversion in the apartment lots was a GST-free supply of a going concern, and that the lots were residential premises, the Commissioner assessed MBI to tax on an increasing adjustment under s 135-5. On disallowance of MBI's objection to the assessment, MBI appealed to the Federal Court.

10 9. Griffiths J held that MBI intended that supplies made through the enterprise comprising the going concern would be input taxed, and that in consequence there was an increasing adjustment, and dismissed the appeal. The supply which his Honour held to be input taxed was a continuation of the supply made upon grant of the lease.<sup>7</sup> MBI  
15 appealed to the Full Court.

10. The Full Court<sup>8</sup> allowed the appeal. Edmonds J, with whom the other members of the Court agreed,<sup>9</sup> held (adopting<sup>10</sup> the decision in *South Steyne*), that the only supply in respect of the lease was the grant of the lease, and that the supply comprising the grant of the lease did not survive the sale of the reversion to MBI.<sup>11</sup>

20 11. The Full Court accordingly held that there had been no supply by MBI to Mirvac, and in consequence no input taxed supply, and that the requirement in s 135-5(1)(b) was not satisfied so that there was no increasing adjustment. The appeal was allowed.

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<sup>3</sup> *South Steyne Hotel Pty Ltd v FC of T* (2009) 180 FCR 409, 423 [75].

<sup>4</sup> *South Steyne Hotel Pty Ltd v FC of T* (2009) 180 FCR 409, 411 [2], 417 [32], [34], 423 [76].

<sup>5</sup> *South Steyne Hotel Pty Ltd v FC of T* (2009) 180 FCR 409, 411 [1], 414 [17], 416 [30], 426 [84-85].

<sup>6</sup> GST Act s 38-325; *South Steyne* at 411 [3], 420 [50] (Edmonds J dissenting).

<sup>7</sup> *MBI Properties Pty Ltd v FC of T* [2013] FCA 56 at [38].

<sup>8</sup> *MBI Properties Pty Ltd v FC of T* (2013) 215 FCR 65.

<sup>9</sup> Farrell J at 215 FCR 65, 74 [44]; Davies J at 74 [45], 75 [50].

<sup>10</sup> *MBI Properties Pty Ltd v FC of T* (2013) 215 FCR 65, 68 [14], 71 [26].

<sup>11</sup> *MBI Properties Pty Ltd v FC of T* (2013) 215 FCR 65, 71 [24]-[26], 72 [29].

**Part VI: Appellant's argument**

*(a) The Appellant's submission in summary*

12. The rights and obligations arising between the owner of the estate in fee simple in land and the tenant of that land consequent upon the making of a lease of the land are  
5 neither exhausted by the grant of, nor exhaustively comprised in, the leasehold estate created by the grant. Rights and obligations subsist after grant and subsist between a purchaser of the reversion and the tenant. Performance of the landlord's obligations comprises a "supply" for the purposes of s 9-10 of the GST Act.
13. Both the Full Court in *South Steyne* and the Full Court in this appeal were wrong to hold  
10 that there was no supply by MBI to Mirvac while Mirvac remained lessee of the apartment lots after MBI's purchase of the reversion in them.
14. The obligations of the landlord (and so of MBI) arise from the lease and their performance is a supply of premises "by way of lease" from the landlord to the tenant, *a fortiori* in the present case because MBI expressly covenanted with the tenant to  
15 perform its obligations under the lease. The premises leased were residential premises. The supply is in consequence input taxed under s 40-35 of the GST Act.
15. The supply of the reversion in the land to MBI was a supply of a going concern and was GST-free by force of s 38-325 of the GST Act. MBI intended that the performance of its obligations as landlord should be made through the enterprise comprising the going  
20 concern supplied to it, and so intended that there should be supplies made through that enterprise which were neither taxable supplies nor GST-free supplies. In consequence MBI had an increasing adjustment by operation of s 135-5(1) of the GST Act. Save for the argument raised in MBI's notice of contention, addressed below, the amount of the adjustment is not in issue.

25 *(b) Statutory context*

16. What comprises a "supply" for GST purposes is entirely a matter of the application of the GST Act, properly construed, to the legal and factual circumstances of the taxpayer. By s 9-10 a "supply" is "any form of supply whatsoever," including without limitation entry  
30 into an obligation to tolerate a situation, and whether or not the taxpayer is obliged to do that which comprises making the supply.
17. By s 9-40, "You must pay the GST payable on any taxable supply that you make," and by s 9-5 "you make a taxable supply if (a) you make the supply for consideration" and other

conditions (not here in issue) are met. By s 9-70 and s 9-75, taken together, the amount of GST is 1/11th of the amount of the consideration for the supply.<sup>12</sup> By the combined effect of Divisions 17 and 33, the tax payable is the taxpayer's net amount<sup>13</sup> for a tax period, and by s 29-5 GST payable by a taxpayer is attributable to the tax period in which any of it is received.<sup>14</sup> GST is not payable more than once in relation to any amount of consideration.<sup>15</sup>

18. The combined effect of these provisions is that 1/11th of the consideration received by a taxpayer in connection with<sup>16</sup> any supply made by the taxpayer is payable as GST in the first tax period in which any part of the consideration is (or in an appropriate case is deemed to be) received by the taxpayer. It does not matter that another supply in connection with the consideration was made in another tax period.<sup>17</sup>

19. Where (as in the present case) a taxpayer receives a supply of a going concern, and "intend[s] that some or all of the supplies made through the enterprise to which the supply relates will be supplies that are neither taxable supplies nor GST-free supplies," the taxpayer is liable to GST on an "increasing adjustment" under s 135-5. The increasing adjustment is, by s 135-5(2), calculated as a proportion of the "supply price," defined as "the price of the supply in relation to which the increasing adjustment arises."

20. It is the liability to an increasing adjustment under s 135-5 that is in contest in this appeal.

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<sup>12</sup> In the language of commerce, the price is increased by 10% for GST; in the language of the statute, GST is 10% of the value of the supply, s 9-70, and the value is 10/11ths of the "price," defined as the value of the consideration for the supply, s 9-75

<sup>13</sup> The net amount is the excess of GST on taxable supplies attributable to the tax period over input tax credits on creditable acquisitions and imports attributable to the period, s 17-5; if input tax credits exceed tax payable, the taxpayer is entitled to a refund, s 35-5.

<sup>14</sup> Division 156, which applies only to taxable supplies, deems a supply by way of lease to be made on a progressive basis over the term of the lease (s 156-22), and makes consideration paid on a progressive basis attributable as if each periodic component of the supply were a separate supply (s 156-5).

<sup>15</sup> *FC of T v Qantas Airways Ltd* (2012) 247 CLR 286 at [5], [10].

<sup>16</sup> The breadth of the concept of "consideration" and of the nexus between payment and supply which will suffice for a payment to be "consideration" is emphasized by the wide language of s 9-15.

<sup>17</sup> *FC of T v Qantas Airways Ltd* (2012) 247 CLR 286 at [20], [28], [33]; cf *FC of T v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 242.

(c) *The rights and obligations subsisting between MBI and Mirvac*

21. Execution of a lease constitutes both “an executory contract and an executed demise,”<sup>18</sup> and “the leasehold estate cannot be divorced from its origins and basis in contract.”<sup>19</sup>

5 While the leasehold estate in the apartment lots was created, and so supplied, on execution of the lease,<sup>20</sup> the benefit of the lease and of its terms continued to be supplied from time to time during the lease by South Steyne until, and by MBI after, the sale of the reversion: “the rights and duties of the landlord and tenant, whether as an original party to the lease or as a successor in title, stem from the contract of lease and any later contract made in relation to that lease.”<sup>21</sup>

10 22. The obligations in the present case included the lessor’s covenant that Mirvac “may during the Term occupy and use [the lot] and exercise exclusively the other rights conferred on [Mirvac] by the owner by this lease without interruption or interference by the owner.” Not only did MBI, upon becoming entered on the Register maintained under the Real Property Act, become by statute “subject to all covenants and conditions therein expressed to be performed on the part of the lessor,”<sup>22</sup> it elected to be subject to  
15 the Mirvac scheme and agreed to give an express covenant<sup>23</sup> that it acquired the lots

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<sup>18</sup> *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 51 per Deane J, and to the same effect, per Mason J at 27-29, Brennan J at 43, Dawson and Wilson JJ concurring; *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51 at [39], [61]. See also *Rye v Rye* [1962] AC 496, 505, per Viscount Simonds: “a lease not only has a contractual basis between lessor and lessee, but operates also to vest an estate in the lessee.”

<sup>19</sup> *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 53. See also (in other jurisdictions) *Highway Properties Ltd v Kelly Douglas & Co Ltd* [1971] SCR 562, 576.7; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 691G, 694D, 702-3, 717F; *Tan Soo Leng David v Lim Thian Chai Charles* [1998] 2 SLR 923 at [17], [28]; and see Gray & Gray, *Elements of Land Law* (Oxford, 5th ed, 2009) at [4.1.8 - 4.1.17].

<sup>20</sup> A leasehold estate in equity was created on execution; a legal estate was created only on registration, the lease term being more than 3 years, *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 25-7.

<sup>21</sup> *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51 at [40], see also at [49], [62], [64]-[65].

<sup>22</sup> Real Property Act 1900 (NSW), s 40(3); by the Conveyancing Act 1919 (NSW) s 118, “The obligation of a covenant entered into by a lessor ... shall ... be annexed and incident to, and shall go with [the] reversionary estate ... and may be taken advantage of and enforced by the person in whom the term is from time to time vested ... and ... the obligation aforesaid may be taken advantage of and enforced against any person ... entitled [to that reversionary estate]”; correspondingly, the rent reserved and the benefit of the lessee’s covenants vest in the purchaser, s 117. By submitting itself to the statutory obligations, MBI made a supply to Mirvac, the sitting tenant: it entered into an obligation to do what the statute required, and to tolerate Mirvac’s possession of the premises (s 9-10(2)(g), as well as the general operation of s 9-10(1)).

<sup>23</sup> The execution of the covenant, creating rights in the covenantee tenant, is itself a “supply” within the definition in s 9-10, and being a covenant to comply with the landlord’s obligations under the lease, is a supply by way of lease for s 40-35 purposes and a sufficient input taxed supply for s 135-5(1)(b) purposes. The Full Federal Court in *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* (2006) 156 FCR 461, 468 [22], so held in

“subject to the lease” and that it agreed “to comply with all the obligations of the landlord in the lease.”

(d) *The application of s 135-5 to MBI*

5 23. That MBI “intended” that Mirvac should under the leases granted by South Steyne continue to have the benefit of possession of the apartment premises, and the benefit of performance of the covenants of and obligations imposed on the owner of those premises by the leases to Mirvac, is not and could not be contested. Nor is it in contest that the apartment premises are “residential premises” for GST purposes.

10 24. The only question in issue is whether the continued enjoyment of exclusive possession, and of the performance of those covenants and obligations, is the subject of a “supply” by MBI for GST purposes; if so, it is an input taxed supply (by force of s 40-35(1)) and the requirements of s 135-5(1) are met.

15 25. The definition of “supply” in the GST Act, deliberately and expressly, is one of the widest possible import: “A supply is *any form of supply whatsoever*,” language which could not sensibly be wider.<sup>24</sup> Subsection (2) emphasises the point: its examples are given “without limiting subsection (1)”. By subsection (3) “It *does not matter* whether it is lawful to do, to refrain from doing, or to tolerate the act or situation constituting the supply.” The discharge by MBI of its obligations as landlord, imposed on it by way of the lease which became binding upon it, is a “supply” of the apartment premises and the benefit of those obligations (including the obligation to afford quiet possession) to  
20 Mirvac.

(e) *The errors in the reasons of the Full Court*

25 26. The essential error in the reasons of the Full Court, both in South Steyne and in the present appeal (where the reasons given in *South Steyne* were expressly adopted<sup>25</sup>), is the adoption of the premise that there is only one supply between landlord and tenant, being the *grant* of the lease, so that following a sale of the reversion there cannot be a supply of the premises under the lease by the new owner to the tenant.

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relation to s 9-10; the grounds on which the Full Court in the present matter distinguished *Westley Nominees* (that the earlier decision was concerned with different legislation) are, with respect, unsustainable.

<sup>24</sup> Cf *Travellex Ltd v FC of T* (2010) 241 CLR 510 at [14], *Reglon Pty Ltd v FC of T* (2011) 212 FCR 422 at [21].

<sup>25</sup> Edmonds J at [14], [24]; Farrell J (at [44]) and Davies J (at [45]) agreeing in his Honour’s reasons.

27. The underlying idea and implicit premise in this reasoning is the notion that in any commercial dealing there is, for GST purposes, only one relevant supply, to be identified as that which is “the essence and sole purpose of the transaction.” It finds expression in the reasons in *South Steyne*:<sup>26</sup> in the words of Finn J, “the burden of the landlord’s covenant ‘ran’ with the reversion by virtue of real property legislation ... and not by virtue of a distinct supply agreement or arrangement,” and in the words of Edmonds J, “[Mirvac’s] lease, originally granted by South Steyne, continued uninterrupted by the change in the owner of the reversionary interest. In other words, there is no ... supply [by MBI], merely a continuation of the ... supply [by South Steyne].” Emmett J, less emphatically, was of the same view (“The better view is that there was no further supply, merely by reason of the continuation of the leases after the sale of the reversion”). Those passages, repeated and adopted by the Full Court in the present appeal, are the foundation of the central reasoning below:<sup>27</sup>

... The lease is the subject of the supply, not the “supply”; the “supply” is the grant of the lease: see s 9-10(2)(d) of the GST Act. The act of grant does not continue for the term of the lease; the “supply” is complete on the lease coming into existence. The “supply” constituted by the grant of the lease did not continue beyond the grant ...

28. The notion that there is only one, “essential,” supply, repeatedly adopted in the Full Court, has been rejected in this Court.<sup>28</sup> It should be rejected in this case. The statutory question is not whether the grant of the lease by South Steyne was an input taxed supply which MBI as purchaser of the apartments “going concern” intended to make, but whether MBI as purchaser intended to make “any form of supply whatsoever” through the “enterprise” comprising ownership of the apartments.

29. Continued provision of the occupation and quiet enjoyment of the premises under the leases is a “supply” which MBI intended to make, and is one which is input taxed.

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<sup>26</sup> The relevant passages are set out in the judgment of Edmonds J below at [14].

<sup>27</sup> Edmonds J at [24]; cf at [25], “If the ‘supply’ constituted by the grant of the lease did not survive the grant, it certainly did not survive the sale of the reversion from South Steyne to MBI. ...” and at [26], “...The grant was the ‘supply’.” Although these observations were made in response to an argument that the supply by South Steyne of the occupation and quiet enjoyment of the apartments continued after transfer of the reversion, they are founded on the same notion that there is only one relevant supply, the grant of the lease, and no other supply of use, occupation and enjoyment of the premises and the rights and obligations under the lease.

<sup>28</sup> The analysis was adopted by the Full Court in *Qantas Airways Ltd v FC of T* (2011) 195 FCR 260, 278 [56]-[57], cf the reasoning of the Full Court in *Reliance Carpet Company Pty Ltd v FC of T* (2007) 160 FCR 433, 445 [18]. Both decisions were reversed, on the “essence and sole purpose” point, in this Court: *FC of T v Qantas Airways Ltd* (2012) 247 CLR 286, *FC of T v Reliance Carpet Company Pty Ltd* (2008) 236 CLR 342, 347-348 [13].

30. The Full Court should have so held, and should in consequence have held that the requirements of s 135-5 for an increasing adjustment were satisfied.

(f) *The Respondent's notice of contention*

31. The contention notified is that "if ... the Respondent intended to make a supply or  
5 supplies through the enterprise it acquired [GST-free] ... there was no price for that supply or those supplies" and so no s 135-5(2) increasing adjustment.<sup>29</sup>

32. The Appellant understands<sup>30</sup> the Respondent's argument in support of the contention to be that if MBI made a supply to Mirvac by entry into the obligation to suffer Mirvac's continued possession of the premises, there was no "price" for that supply; and that in  
10 consequence there was no "proportion of non-creditable use" (and therefore no increasing adjustment) because no percentage, or no percentage greater than zero, can be "worked out on the basis of the \*prices of those supplies" as required by the formula in s 135-5(2).

33. The Appellant submits that this argument must fail on each of two independent  
15 grounds:

(a) MBI intended to make a "supply" to Mirvac of the use of the premises for a price comprising the rent payable by Mirvac; that it also intended to supply an assumption of the obligations under the landlord's covenants does not make the latter the only input taxed supply which it intended to make, and

20 (b) the rent payable to MBI was the "price" of all and each of the supplies (all input taxed supplies) which MBI intended should be made through that going concern.

34. By the definition of "price" in s 9-75, relevantly, "*price* is ... so far as the \*consideration for the supply is consideration expressed as an amount of \*money – the amount." "Consideration" is defined in s 9-15 to include<sup>31</sup> "any payment, or any act or forbearance,  
25 in connection with a supply of anything," or "in response to" such a supply, whether or not voluntarily made.

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<sup>29</sup> The amount of the increasing adjustment is 10% of the price of the going concern, multiplied by the "proportion of non-creditable use": s 135-5(2).

<sup>30</sup> The alternative argument, that if MBI intended that there should through the going concern be a supply to Mirvac (whether by itself or by way of continuation of the supply by South Steyne), it was a supply for which there was no price for subs (2) purposes, was not advanced and so was not articulated in the Federal Court.

<sup>31</sup> The definition is inclusive, not exhaustive, cf *FC of T v St Hubert's Island Pty Ltd (in liq)* (1978) 138 CLR 210, 216, 229.

35. MBI made a supply to Mirvac both of the use of the premises and of the benefit of the landlord's covenants under the lease. Wholly "in connection with" both and each of those supplies, MBI received the rent paid by Mirvac, month by month after its purchase of the reversion. That rent was the s 9-15 consideration, and being expressed in money its amount was the price, of both and each of the supplies made or intended to be made through the enterprise comprised in the going concern acquired GST-free by MBI. There is no suggestion, and *a fortiori* no evidence, of any "price" of any other supply. The "proportion of non-creditable use" was 100%.

36. The contention should be rejected.

(g) *Inconsistency with the legislative scheme*

37. The reasoning of the Full Court should be assessed in the light of the consequences it would have in cases other than that immediately in issue, including the case where a supply by the purchaser of the reversion to the tenant would be a taxable supply rather than (as here) an input taxed supply.

38. The design of the tax imposed by the GST Act is that liability for GST on taxable supplies falls on the supplier, and is recovered by the supplier from the acquirer by way of an increase in the consideration for the supply; the increase gives rise to an input tax credit if the acquirer is registered and the acquisition is for a creditable purpose. At each stage before supply to a non-business consumer, the net receipt by the supplier, and correspondingly the net outlay by the acquirer, is the price less the GST.<sup>32</sup>

39. In the case of a lease to a tenant using the premises for a creditable purpose, the legislative scheme is that the rent will be fixed to recover the GST liability of the lessor, and the tenant will recoup that part of the rent as an input tax credit.

40. If the decision of the Full Court (that there is no supply by the purchaser landlord to the sitting tenant) is correct, the rent paid by the tenant to the purchaser of the reversion would give rise to neither GST nor input tax credits, notwithstanding that before the purchase the same rent under the same lease had generated both tax and credits, and

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<sup>32</sup> The legislative scheme is succinctly described by Hill J in *HP Mercantile Pty Ltd v FC of T* (2005) 143 FCR 553, 557 [13]-[15].

notwithstanding that the amount of rent did not change: a capricious<sup>33</sup> and “curious result”<sup>34</sup> inconsistent with the legislative scheme.

**Part VII – Legislation**

41. The relevant statutory provisions as in force in the year of income (as presently in force,  
5 materially unchanged) are the sections of the GST Act which are attached as Appendix A.

**Part VIII – Orders sought**

42. The Appellant seeks the following orders:

(a) Appeal allowed.

(b) Set aside the orders of the Full Court of the Federal Court of Australia made 18  
10 October 2013 in proceeding NSD 329 of 2013, and in place thereof order that the  
appeal to that Court be dismissed.

No order is sought as to costs. The Appellant (as part of his test case funding program)  
has undertaken to pay the Respondent’s costs of the appeal, to be taxed in default of  
agreement.

15 **Part IX – Estimate**

43. The estimate of hours required for the presentation of the appellant’s oral argument  
(including reply) is 2 hours.

Dated: 16 May 2014

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<sup>33</sup> The new landlord would make a super profit of the amount of GST built into the rent (but not on the Full Court’s reasoning payable, because there is no “supply”) and the sitting tenant would suffer a matching loss (ineligibility for input tax credits, s 11-5(b), s 11-25) for which it bore no responsibility.

<sup>34</sup> *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461, 468 [21]-[22].

BETWEEN:

COMMISSIONER OF TAXATION  
Appellant

and

MBI PROPERTIES PTY LTD  
Respondent

## APPENDIX A: LEGISLATION

### (A) RELEVANT PROVISIONS IN FORCE AT RELEVANT TIME

The tax period in issue in the appeal is the quarter ending 31 December 2007. The relevant statutory provisions, as they existed at the relevant time, are as follows:

## A New Tax System (Goods and Services Tax) Act 1999

Act No. 55 of 1999 as amended

### Part 2-2—Supplies and acquisitions

#### Division 9—Taxable supplies

...

#### Subdivision 9-A—What are taxable supplies?

##### 9-5 Taxable supplies

You make a *taxable supply* if:

- (a) you make the supply for \*consideration; and
- (b) the supply is made in the course or furtherance of an \*enterprise that you \*carry on; and
- (c) the supply is \*connected with Australia; and
- (d) you are \*registered, or \*required to be registered.

However, the supply is not a \*taxable supply to the extent that it is \*GST-free or \*input taxed.

## 9-10 Meaning of *supply*

- (1) A **supply** is any form of supply whatsoever.
- (2) Without limiting subsection (1), **supply** includes any of these:
  - (a) a supply of goods;
  - (b) a supply of services;
  - (c) a provision of advice or information;
  - (d) a grant, assignment or surrender of \*real property;
  - (e) a creation, grant, transfer, assignment or surrender of any right;
  - (f) a \*financial supply;
  - (g) an entry into, or release from, an obligation:
    - (i) to do anything; or
    - (ii) to refrain from an act; or
    - (iii) to tolerate an act or situation;
  - (h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).
- (3) It does not matter whether it is lawful to do, to refrain from doing or to tolerate the act or situation constituting the supply.
- (3A) For the avoidance of doubt, the delivery of:
  - (a) livestock for slaughtering or processing into \*food; or
  - (b) game for processing into \*food;under an arrangement under which the entity making the delivery only relinquishes title after food has been produced, is the supply of the livestock or game (regardless of when the entity relinquishes title). The supply does not take place on or after the subsequent relinquishment of title.
- (4) However, a supply does not include a supply of \*money unless the money is provided as \*consideration for a supply that is a supply of money.

## 9-15 Consideration

- (1) **Consideration** includes:
  - (a) any payment, or any act or forbearance, in connection with a supply of anything; and
  - (b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.
- (2) It does not matter whether the payment, act or forbearance was voluntary, or whether it was by the \*recipient of the supply.
- (2A) It does not matter:
  - (a) whether the payment, act or forbearance was in compliance with an order of a court, or of a tribunal or other body that has the power to make orders; or
  - (b) whether the payment, act or forbearance was in compliance with a settlement relating to proceedings before a court, or before a tribunal or other body that has the power to make orders.

(2B) For the avoidance of doubt, the fact that the supplier is an entity of which the \*recipient of the supply is a member, or that the supplier is an entity that only makes supplies to its members, does not prevent the payment, act or forbearance from being consideration.

(3) However:

(a) if a right or option to acquire a thing is granted, then:

(i) the consideration for the supply of the thing on the exercise of the right or option is limited to any additional consideration provided either for the supply or in connection with the exercise of the right or option; or

(ii) if there is no such additional consideration—there is no consideration for the supply; and

(b) making a gift to a non-profit body is not the provision of consideration; and

(c) a payment made by a \*government related entity to another government related entity is not the provision of consideration if the payment is specifically covered by an appropriation under an \*Australian law.

...

### 9-30 Supplies that are GST-free or input taxed

#### *GST-free*

(1) A supply is **GST-free** if:

(a) it is GST-free under Division 38 or under a provision of another Act; or

(b) it is a supply of a right to receive a supply that would be GST-free under paragraph (a).

#### *Input taxed*

(2) A supply is **input taxed** if:

(a) it is input taxed under Division 40 or under a provision of another Act; or

(b) it is a supply of a right to receive a supply that would be input taxed under paragraph (a).

Note: If a supply is input taxed, there is no entitlement to an input tax credit for the things that are acquired or imported to make the supply (see sections 11-15 and 15-10).

#### *Supplies that would be both GST-free and input taxed*

(3) To the extent that a supply would, apart from this subsection, be both \*GST-free and \*input taxed:

(a) the supply is GST-free and not input taxed, unless the provision under which it is input taxed requires the supplier to have chosen for its supplies of that kind to be input taxed; or

(b) the supply is input taxed and not GST-free, if that provision requires the supplier to have so chosen.

Note: Subdivisions 40-E (School tuckshops and canteens) and 40-F (Fund-raising events conducted by charitable institutions etc.) require such a choice.)

*Supply of things used solely in connection with making supplies that are input taxed but not financial supplies*

- (4) A supply is taken to be a supply that is \*input taxed if it is a supply of anything (other than \*new residential premises) that you have used *solely* in connection with your supplies that are input taxed but are not \*financial supplies.

...

## **Subdivision 9-B—Who is liable for GST on taxable supplies?**

### **9-40 Liability for GST on taxable supplies**

You must pay the GST payable on any \*taxable supply that you make.

...

## **Subdivision 9-C—How much GST is payable on taxable supplies?**

### **9-70 The amount of GST on taxable supplies**

The amount of GST on a \*taxable supply is 10% of the \*value of the taxable supply.

### **9-75 The value of taxable supplies**

- (1) The **value** of a \*taxable supply is as follows:

$$\text{Price} \times \frac{10}{11}$$

where:

**price** is the sum of:

- (a) so far as the \*consideration for the supply is consideration expressed as an amount of \*money—the amount (without any discount for the amount of GST (if any) payable on the supply); and
- (b) so far as the consideration is not consideration expressed as an amount of money—the \*GST inclusive market value of that consideration.

Example: You make a taxable supply by selling a car for \$22,000 in the course of carrying on an enterprise.

The value of the supply is:

$$\$22,000 \times \frac{10}{11} = \$20,00$$

The GST on the supply is therefore \$2,000 (i.e. 10% of \$20,000).

- (2) However, if the taxable supply is of a \*luxury car, the **value** of the taxable supply is as follows:

$$\text{Luxury car tax value} \times \frac{10}{11}$$

where:

**luxury car tax value** has the meaning given by section 5-20 of the *A New Tax System (Luxury Car Tax) Act 1999*.

- (3) In working out under subsection (1) the value of a \*taxable supply made in a \*tax period, being a supply that is a \*fringe benefit, the price is taken to be the sum of:
- (a) to the extent that, apart from this subsection, paragraph (a) of the definition of *price* in subsection (1) would be applicable:
    - (i) if the fringe benefit is a car fringe benefit—so much of the amount that would be worked out under that paragraph as represented the \*recipient's payment made in that period; or
    - (ii) if the fringe benefit is a benefit other than a car fringe benefit—so much of the amount that would be worked out under that paragraph as represented the \*recipients contribution made in that period; and
  - (b) to the extent that, apart from this subsection, paragraph (b) of the definition of *price* in subsection (1) would be applicable:
    - (i) if the fringe benefit is a car fringe benefit—so much of the amount that would be worked out under that paragraph as represented the recipient's payment made in that period; or
    - (ii) if the fringe benefit is a benefit other than a car fringe benefit—so much of the amount that would be worked out under that paragraph as represented the recipients contribution made in that period.

...

## Division 11—Creditable acquisitions

...

### 11-5 What is a creditable acquisition?

You make a *creditable acquisition* if:

- (a) you acquire anything solely or partly for a \*creditable purpose; and
- (b) the supply of the thing to you is a \*taxable supply; and
- (c) you provide, or are liable to provide, \*consideration for the supply; and
- (d) you are \*registered, or \*required to be registered.

...

### 11-25 How much are the input tax credits for creditable acquisitions?

The amount of the input tax credit for a \*creditable acquisition is an amount equal to the GST payable on the supply of the thing acquired. However, the amount of the input tax credit is reduced if the acquisition is only \*partly creditable.

...

## Part 2-4—Net amounts and adjustments

### Division 17—Net amounts and adjustments

...

#### 17-5 Net amounts

- (1) The *net amount* for a tax period applying to you is worked out using the following formula:

$$\text{GST} - \text{Input tax credits}$$

where:

**GST** is the sum of all of the GST for which you are liable on the \*taxable supplies that are attributable to the tax period.

**input tax credits** is the sum of all of the input tax credits to which you are entitled for the \*creditable acquisitions and \*creditable importations that are attributable to the tax period.

For the basic rules on what is attributable to a particular period, see Division 29.

- (2) However, the \*net amount for the tax period may be increased or decreased if you have any \*adjustments for the tax period.

...

## Part 2-6—Tax periods

...

### Division 29—What is attributable to tax periods

...

#### Subdivision 29-A—The attribution rules

##### 29-5 Attributing the GST on your taxable supplies

- (1) The GST payable by you on a \*taxable supply is attributable to:
- (a) the tax period in which any of the \*consideration is received for the supply; or
  - (b) if, before any of the consideration is received, an \*invoice is issued relating to the supply—the tax period in which the invoice is issued.
- (2) However, if you \*account on a cash basis, then:
- (a) if, in a tax period, *all* of the \*consideration is received for a \*taxable supply—GST on the supply is attributable to that tax period; or
  - (b) if, in a tax period, *part* of the consideration is received—GST on the supply is attributable to that tax period, but only to the extent that the consideration is received in that tax period; or
  - (c) if, in a tax period, *none* of the consideration is received—none of the GST on the supply is attributable to that tax period.

...

## Part 2-7—Returns, payments and refunds

...

### Division 33—Payments of GST

...

#### 33-3 When payments of net amounts must be made—quarterly tax periods

If:

- (a) the \*net amount for a tax period applying to you is greater than zero; and
- (b) the tax period is a \*quarterly tax period;

you must pay the net amount to the Commissioner as follows:

| When quarterly GST payments must be made |   |   |
|--|---|---|
| Item                                     | If this day falls within the quarterly tax period ... | Pay the net amount to the Commissioner on or before this day: |
| 1  | 1 September   | the following 28 October                                      |
| 2  | 1 December  | the following 28 February                                     |
| 3  | 1 March   | the following 28 April  |
| 4  | 1 June  | the following 28 July   |

...

## Division 35—Refunds

...

### 35-5 Entitlement to refund

If the \*net amount for a tax period is less than zero, the Commissioner must, on behalf of the Commonwealth, pay that amount (expressed as a positive amount) to you.

Note 1: See Division 3A of Part IIB of, and section 105-65 in Schedule 1 to, the *Taxation Administration Act 1953* for the rules about how the Commissioner must pay you. Division 3 of Part IIB allows the Commissioner to apply the amount owing as a credit against tax debts that you owe to the Commonwealth.

Note 2: Interest is payable under the *Taxation (Interest on Overpayments and Early Payments) Act 1983* if the Commissioner is late in refunding the amount.

...

## Part 3-1—Supplies that are not taxable supplies

### Division 38—GST-free supplies

...

#### Subdivision 38-J—Supplies of going concerns

##### 38-325 Supply of a going concern

- (1) The \*supply of a going concern is ***GST-free*** if:
  - (a) the supply is for \*consideration; and
  - (b) the \*recipient is \*registered or \*required to be registered; and
  - (c) the supplier and the recipient have agreed in writing that the supply is of a going concern.
- (2) A ***supply of a going concern*** is a supply under an arrangement under which:
  - (a) the supplier supplies to the \*recipient all of the things that are necessary for the continued operation of an \*enterprise; and
  - (b) the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as a part of a larger enterprise carried on by the supplier).

...

## Division 40—Input taxed supplies

...

### Subdivision 40-B—Residential rent

#### 40-35 Residential rent

- (1) A supply of premises that is by way of lease, hire or licence (including a renewal or extension of a lease, hire or licence) is *input taxed* if:
  - (a) the supply is of \*residential premises (other than a supply of \*commercial residential premises or a supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises); or
  - (b) the supply is of \*commercial accommodation and Division 87 (which is about long-term accommodation in commercial premises) would apply to the supply but for a choice made by the supplier under section 87-25.
- (1A) A supply of a berth at a marina that is by way of lease, hire or licence (including a renewal or extension of a lease, hire or licence) is *input taxed* if:
  - (a) the berth is occupied, or is to be occupied, by a \*ship used as a residence; and
  - (b) the supply is of \*commercial accommodation and Division 87 (which is about long-term accommodation in commercial premises) would apply to the supply but for a choice made by the supplier under section 87-25.
- (2) However:
  - (a) the supply is input taxed only to the extent that the premises are to be used predominantly for residential accommodation (regardless of the term of occupation); and
  - (b) the supply is not input taxed under this section if the lease, hire or licence, or the renewal or extension of a lease, hire or licence, is a \*long-term lease.

...

## Part 4-4—Special rules mainly about net amounts and adjustments

...

### Division 135—Supplies of going concerns

...

#### 135-5 Initial adjustments for supplies of going concerns

- (1) You have an *increasing adjustment* if:
  - (a) you are the \*recipient of a \*supply of a going concern, or a supply that is \*GST-free under section 38-480; and
  - (b) you intend that some or all of the supplies made through the \*enterprise to which the supply relates will be supplies that are neither \*taxable supplies nor \*GST-free supplies.
- (2) The amount of the increasing adjustment is as follows:

$$\frac{1}{10} \times \text{Supply price} \times \frac{\text{Proportion of non-creditable use}}{\text{Proportion of non-creditable use}}$$

where:

*proportion of non-creditable use* is the proportion of all the supplies made through the \*enterprise that you intend will be supplies that are neither \*taxable supplies nor \*GST-free supplies, expressed as a percentage worked out on the basis of the \*prices of those supplies.

*supply price* means the \*price of the supply in relation to which the increasing adjustment arises.

...

## **Part 4-6—Special rules mainly about tax periods**

...

### **Division 156—Supplies and acquisitions made on a progressive or periodic basis**

...

#### **156-5 Attributing the GST on progressive or periodic supplies**

- (1) The GST payable by you on a \*taxable supply that is made:
  - (a) for a period or on a progressive basis; and
  - (b) for \*consideration that is to be provided on a progressive or periodic basis; is attributable, in accordance with section 29-5, as if each progressive or periodic component of the supply were a separate supply.
- (2) If the progressive or periodic components of such a supply are not readily identifiable, the components correspond to the proportion of the total \*consideration for the supply that the separate amounts of consideration represent.

...

#### **156-22 Leases etc. treated as being on a progressive or periodic basis**

For the purposes of this Division, a supply or acquisition by way of lease, hire or similar arrangement is to be treated as a supply or acquisition that is made on a progressive or periodic basis, for the period of the lease, hire or arrangement.

**(B) WHETHER PROVISIONS STILL IN FORCE IN THIS FORM**

Except as indicated below, the above provisions are still in force in that form, at the date of these submissions.

- 1) Section 11-25 was amended by the *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010*, Act No 74 of 2010, s 3 & item 3 of Sch 2, to insert at the end of the provision the following note:

Note: The basic rule for working out the GST payable on the supply is in Subdivision 9-C. However, the GST payable may be affected by other provisions in:  
(a) this Act (for a list of provisions, see section 9-99); and  
(b) other GST laws (for example, see subsection 357-60(3) in Schedule 1 to the *Taxation Administration Act 1953* (about the effect of rulings made under Part 5-5 in that Schedule)).

- 2) Subsection 17-5(2) was repealed by *Indirect Tax Laws Amendment (Assessment) Act 2012*, Act No 39 of 2012, s 3 & item 1 of Sch 3, and replaced by the following provision:

- (2) However, the \*net amount for the tax period:  
(a) may be increased or decreased if you have any \*adjustments for the tax period; and  
(b) may be increased or decreased under Subdivision 21-A of the \*Wine Tax Act; and  
(c) may be increased or decreased under Subdivision 13-A of the *A New Tax System (Luxury Car Tax) Act 1999*.

Note 1: Under Subdivision 21-A of the Wine Tax Act, amounts of wine tax increase the net amount, and amounts of wine tax credits reduce the net amount.

Note 2: Under Subdivision 13-A of the *A New Tax System (Luxury Car Tax) Act 1999*, amounts of luxury car tax increase the net amount, and luxury car tax adjustments alter the net amount.

- 3) Section 33-3 was amended by *Indirect Tax Laws Amendment (Assessment) Act 2012*, s 3 & items 49-52 of Sch 1. The section as amended now reads:

**33-3 When payments of assessed net amounts must be made—quarterly tax periods**

if:

- (a) the \*assessed net amount for a tax period applying to you is greater than zero; and  
(b) the tax period is a \*quarterly tax period;

you must pay the assessed net amount to the Commissioner as follows:

| <b>When quarterly GST payments must be made</b> |  |   |
|---|--|---|
| <b>Item</b>                                     | <b>If this day falls within the quarterly tax period ...</b> | <b>Pay the assessed net amount to the Commissioner on or before this day:</b> |
| 1   | 1 September  | the following 28 October  |
| 2   | 1 December   | the following 28 February   |
| 3   | 1 March  | the following 28 April  |
| 4   | 1 June   | the following 28 July   |

4) Section 35-5 has twice been amended. Firstly, by *Tax Laws Amendment (2009 GST Administration Measures) Act 2010*, Act No 20 of 2010, s 3 & items 1 & 2 of Sch 5, the existing provision became subsection (1) and a new subsection (2) was inserted as follows:

(2) However, if the amount paid, or applied under the *Taxation Administration Act 1953*, exceeds the amount to which you are properly entitled under subsection (1), the excess is to be treated as if it were GST that became payable, and due for payment, by you at the time when the amount was paid or applied.

Note: The main effect of treating the amount as if it were GST is to apply the collection and recovery rules in Part 3-10 in Schedule 1 to the *Taxation Administration Act 1953*, such as a liability to pay the general interest charge under section 105-80 in that Schedule.

5) Section 35-5 was further amended by *Indirect Tax Laws Amendment (Assessment) Act 2012*, s 3 & items 65-67 of Sch 1. The provision as amended reads as follows:

### 35-5 Entitlement to refund

(1) If the \*assessed net amount for a tax period is less than zero, the Commissioner must, on behalf of the Commonwealth, pay that amount (expressed as a positive amount) to you.

Note 1: See Division 3A of Part IIB of, and section 105-65 in Schedule 1 to, the *Taxation Administration Act 1953* for the rules about how the Commissioner must pay you. Division 3 of Part IIB allows the Commissioner to apply the amount owing as a credit against tax debts that you owe to the Commonwealth.

Note 2: Interest is payable under the *Taxation (Interest on Overpayments and Early Payments) Act 1983* if the Commissioner is late in refunding the amount.

(2) However, if:

- (a) the Commissioner amends the \*assessment of your \*net amount; and
- (b) your \*assessed net amount before the amendment was less than zero; and
- (c) the amount that, because of the assessment, was:

(i) paid; or

(ii) applied under the *Taxation Administration Act 1953*;

exceeded the amount (including a nil amount) that would have been payable or applicable had your assessed net amount always been the later assessed net amount;

the amount of the excess is to be treated as if:

- (d) the excess were an assessed net amount for the tax period; and
- (e) that assessed net amount were an amount greater than zero and equal to the amount of the excess; and
- (f) despite Division 33, that assessed net amount became payable, and due for payment, by you at the time when the amount was paid or applied.

Note: Treating the excess as if it were an assessed net amount has the effect of applying the collection and recovery rules in Part 3-10 in Schedule 1 to the *Taxation Administration Act 1953*, such as a liability to pay the general interest charge under section 105-80 in that Schedule.