IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S90 of 2014

BETWEEN:

COMMISSIONER OF TAXATION
Appellant
and
MBI PROPERTIES PTY LTD
Respondent

APPELLANT'S REPLY

Part I: The Appellant certifies that this Reply is in a form suitable for publication on the Internet.

Part II: Reply

The primary issue in the appeal

1. The Respondent's submissions do not address the primary contention advanced by the Appellant: that by purchasing the apartment premises subject to the lease to Mirvac, MBI both by statute and by contract committed itself to undertake and perform the obligations of the lessor to Mirvac as lessee (including the obligations to cede to Mirvac exclusive possession and enjoyment of the apartments and of their contents) and so intended to make, by way of lease, a supply to Mirvac of the "residential premises" comprising the apartments.

2. By assuming that commitment MBI answered affirmatively the statutory question posed by s 135-5: whether as the recipient of a supply of a going concern,[1] comprising all things necessary for the conduct of the "leasing enterprise"[2] being its "activities done ... on a continuous basis in the form of a lease"[3] of the apartments, MBI "intend[ed] that some or all of the supplies made through" that enterprise would be input taxed.[4]

3. It is no answer to the Appellant's contention, nor to the statutory question, to address the GST consequences of supplies made not by MBI but by South Steyne, whether to Mirvac or to MBI.[5] Nor is it an answer to assert that "mere toleration" of another's

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1 "Going concern" is defined in s 38-385(2); cf Respondent's submissions ("RS") [11]

2 The activities of MBI are aptly so described at RS14

3 Section 9-20(1)(c); no other "enterprise" is advanced, RS14, although the leasing activities may be said also to be done "in the form of a business" within s 9-20(1)(a)

4 Section 40-35, a "supply of premises that is by way of lease, hire or licence ... is ***input taxed*** if ... the supply is of *residential premises."

5 RS11-14. It is not in contest that the supply of the "leasing enterprise" to MBI was GST free.

Filed on behalf of the Appellant

Australian Government Solicitor
Level 42, MLC Centre 19 Martin Place
Sydney NSW 2000
DX 444 Sydney

Date of this document 20 June 2014

Contact: Catherine Leslie
Telephone: 02 9581 7481
Facsimile: 02 9581 7430
E-mail: Catherine.leslie@ags.gov.au

rights[6] is not a supply; the present is not a case of "mere" toleration, but of deliberate assumption and intended performance of the lessor's contractual obligations to the tenant.

4. The submission that a landlord does no more than passively "tolerate" the exercise of the tenant's rights rests on a characterisation of a lease as giving rise only to a proprietary estate in the tenant, a characterisation which, if it was ever accepted,[7] is now rejected: "it is now firmly established that a lease is a species of contract."[8] So fundamental to the relationship of landlord and tenant is its contractual nature that adventitious termination of the contract also extinguishes the leasehold estate.[9] "Even where the rent is fully paid, a lease is ... never fully executed during its term. To the extent ... of the lessor's obligation to give exclusive possession," a lease is always "partly executory."[10]

5. Performance of the lessor's executory obligations is a supply within s 9-10. Where what is supplied under the lease is residential premises, the supply is input taxed; and intent to make such a supply attracts the operation of s 135-5.

The subject of a "supply"

6. The potential subjects of a "supply" under the GST Act are not confined to juridical rights but extend to things;[11] the broad definition in s 9-10 ("any form of supply whatsoever") embraces provision of every possible benefit or advantage, and the creation or satisfaction of rights are the means by which a supply is effected.[12] The relationship of landlord and tenant involves at least two "supplies" within the concept in s 9-10, and in particular within the meaning of s 40-35: a supply of rights (including both the rights comprised in the leasehold estate, and the executory contractual rights subsisting during the currency of the lease), and a supply of a thing (the "premises" supplied by way of use and enjoyment to the tenant).

7. The Full Court both in *South Steyne* and in the present appeal wrongly confines the

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6 RS20-32; the content of this non-statutory expression is obscure. The position of a neighbour (RS22), or of the assignee of a debt (RS28), who has no interaction with the person supposedly benefiting, affords no useful analogy to the present case.

7 Gray & Gray, *Elements of Land Law*, Oxford UP, 5th ed (2009) at [4.1.8]-[4.1.15]

8 *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51, (2013) 304 ALR 80 at [39-40], [61-62]

9 *Willmott Growers* at [54-55], [78]

10 *Willmott Growers* at [66] per Gageler J, citing *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 705

11 *Sterling Guardian Pty Ltd v FC of T* (2005) 220 ALR 550 at [35]-[39] (affirmed, (2006) 149 FCR 255)

12 See the discussion of the nature of "property" in *Yanner v Eaton* (1999) 201 CLR 351 at [17]-[21]; in the context of GST, *FC of T v American Express Wholesale Currency Services Pty Ltd* (2010) 187 FCR 398 at [142]-[148]

potential supply to that of the leasehold estate, reasoning that "the 'supply' is the grant of the lease [and] does not continue for the term of the lease; the 'supply' is complete on the lease coming into existence."[13] In the Commissioner's submission, the supply made to Mirvac extended not only to the grant (by South Steyne) but also to the performance of the landlord's obligations (by South Steyne before and by MBI after the sale) and to the use and enjoyment of the premises (also supplied by South Steyne before and by MBI after the sale).

8. Section 40-35 does not specify as the input taxed supply "the grant of the lease" but rather "a supply *of premises* that is *by way* of lease." In the structure of the section, the lease is the means or manner, not the subject, of the supply; what is supplied is the premises. That supply takes place over time, "by way of lease."[14]

The "price" comprising the rent

9. The argument advanced in support of MBI's notice of contention is that "the rent is consideration for the prior grant of the lease" and therefore cannot be, and is not, "consideration for observing lease covenants" (RS44). The argument rests on a false dichotomy, disregards the language of the statute, and mistakes the case put for the Commissioner at [33]-[36] of his submissions in chief.

10. The "price" for a supply is relevantly the "consideration" for the supply, and "consideration" includes any payment or payments "in connection with" or "in response to" the supply; the statutory nexus is not contractual consideration. The whole of a series of payments may be the "price" of each of several supplies, including supplies of both creation and performance of obligations.[15] Whether or not the rent[16] may be said also to be the "price" of the grant of lease, it is the price of the supply of use of the premises and performance of the lessor's executory obligations.[17]

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13 Edmonds J at [24] (AB290), emphasis added

14 The phrase "by way of" does not mean simply "by grant of." In its ordinary meaning it indicates "a method or means" or "through the medium of" (*FC of T v Precision Pools Pty Ltd* (1994) 53 FCR 183, 188, concerning a receipt "by way of refund"). It extends the reach of the provision in which it occurs beyond that which it qualifies, *McCauley v FC of T* (1944) 69 CLR 235, 241-2, and its scope is to be determined by reference to the context in which it appears and the apparent legislative purpose, *NEC Information Systems Australia Pty Ltd v Lockhart* (1991) 22 NSWLR 518, 522; *DPP v Serratore* (1995) 38 NSWLR 137, 144-5, per Kirby P. Both context and purpose support the construction propounded by the Commissioner.

15 This does not mean that tax is payable more than once: liability to pay is related to the time of receipt of the price, not the time of making the supply or supplies.

16 "Rent reserved" (RS44) is not language used in the GST Act. In any event "rent" is no longer considered a "thing issuing from the land" but "part of the consideration for the right to use the property" (*C of SD v Commonwealth Funds Management Ltd* (1995) 38 NSWLR 173, 176D-E, 180-183; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [285] and [3], [389]), payment of which is performance of one of the executory promises comprised in the lease.

17 The Act does not posit a dichotomy whereby the supply must be, and the price must be for, either creation of rights (or an estate) or performance of obligations, and contrary to RS43 the Commissioner does not submit it

11. Of these, only the latter supply, which is wholly input taxed, is made by MBI. The calculation prescribed by s 135-5 may be made and the proportion is 100%.

The scheme of the Act

12. MBI misstates the operation of the Act in submitting[18] that the supply to Mirvac "was taxed."[19] In any event the implicit appeal to "fairness" is misplaced: MBI acquired its "leasing enterprise" by a GST-free supply, so that the price it paid was not fixed to recover GST payable by South Steyne;[20] the effect of s 135-5[21] is to put it in the same net position as it would have been in had it purchased the apartment under a taxable supply and then leased it to Mirvac, that is, it would have paid a price including an amount to recover GST and would have been denied input tax credits by s 11-5(a) and s 11-15(2)(b).

13. The role of Div 156 in the legislation is not, as is suggested at RS26-27 and RS48, to address the consequences of a dichotomy between grant and performance as the "relevant" supply, but to adjust the attribution rules in Div 29, which fix the time for payment of tax[22] by reference to "the tax period in which *any of the consideration is received*" for any supply "in connection with" which the consideration is received. Absent s 156-5, and whether the grant or the performance of the lease, or both, is taken to be a supply, the whole of the rent is "in connection with" the supply and GST on the supply is attributable to the period in which the first instalment of rent is invoiced or received.

14. Section 156-5 varies the operation of s 29-5 in respect of a taxable supply made "for a period or on a progressive basis ... for a consideration that is to be provided on a

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must be one to the exclusion of the other. The authorities cited at RS42 concerned different statutory language which did posit a dichotomy: the issue in each was whether the payment claimed to be rent was for use of premises or for something quite other: in *Property Holding Co v Clark* [1948] KB 630 for amenities including fittings, light and cleaning; in *Commissioner of Stamp Duties v JV (Crows Nest) Pty Ltd* (1987) 7 NSWLR 529 for administrative services. Neither is of assistance in the present context.

18 RS13

19 GST is payable only on taxable supplies (s 7-1(1)), and input taxed supplies (despite the terminology) are excluded from taxable supplies (s 9-5), so that they are not taxed. Entitlement to input tax credits arises on acquisitions for a creditable purpose, not on the making of supplies.

20 The vendor of a going concern, who makes a GST-free supply, escapes the net burden of GST not by recovering it from the purchaser in the price of the going concern, but by obtaining input tax credits (ss 11-20 and 11-15: the supply is not input taxed but GST-free). If input tax credits have not been claimed (on the basis that s 11-15(2)(a) applies (because the premises are residential premises), an adjustment is allowed to the vendor, s 129-40.

21 That this is the intended effect is manifest in the Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Bill 1998*, at [6.255-6.257].

22 Tax is payable (s 33-3) on the taxpayer's net amount for a tax period, which is the difference between GST payable on taxable supplies by the taxpayer attributable to that period and input tax credits attributable to that period (s 17-5). The tax period to which GST is attributable is fixed by s 29-5(1) as "the tax period in which any of the consideration is received for the supply" or, if earlier, is invoiced.

progressive or periodic basis"[23] by making the GST attributable as if each component of the supply were a separate supply and so attributable to the tax period in which the corresponding component of consideration is received, while s 156-22 deems a supply by way of lease to be "made on a progressive or periodic basis" over the lease term. These provisions apply equally to a characterisation of a lease as a supply by way of grant of the lease and one as a supply by way of performance of the lessor's obligations. The presence of Div 156 does not support MBI's argument.

Capricious outcomes of the Full Court decision

15. The submission at RS50 misconceives the operation of ss 156-5 and 156-22. If as the Full Court held and MBI submits the only supply for which the rent is consideration is the grant of the lease by the vendor, then after the sale and in respect of the lease –

(a) the purchaser/lessor makes no taxable supply and is not liable to pay GST but receives the rent including the GST reimbursement component, so making a capricious profit;

(b) the grantor/vendor receives no rent and is not liable to pay GST;[24]

(c) the tenant remains obliged to pay rent including the reimbursement component, but is not entitled to an input tax credit,[25] so suffering a capricious loss;

(d) if contrary to (b) the grantor/vendor is liable to pay GST, it is so liable notwithstanding that it receives neither rent nor reimbursement; the capricious loss is shifted from the tenant to the vendor.

The operation of s 156-5 (extended by s 156-22) goes only to attribution, and not to deemed receipt of consideration, nor in consequence to liability to pay GST or to entitlement to an input tax credit.

Dated: 20 June 2014

Ben Kasep
Tel 02 8915 5129
bckasep@wentworthchambers.com.au

A H Slater QC
Tel 02 9230 3232
Fax 02 9232 8435
aslater@aslater.com
Counsel for the Appellant

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23 Examples of such supplies include motor vehicle leases, periodical subscriptions, maintenance contracts and tuition or fitness contracts, agreements for which in each case may extend to provision over several years for monthly payments; absent s 156-5, GST at 10/11ths of all the payments over the whole term would be payable in the tax period of first receipt.

24 The rent paid to the purchaser after the sale has insufficient nexus (connection) with the grant by the vendor to be consideration for a supply by the vendor; s 9-40 is not attracted.

25 The amount of input tax credit is limited to "the GST payable on the supply" of what it acquires, s 11-25, and no GST is payable by either vendor or purchaser as landlord.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. 109 of 2014

BETWEEN:

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Appellant

And

SZSCA
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

APPELLANT'S LIST OF AUTHORITIES

International Convention and legislation

1. Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, Article 1A(2)

2. *Migration Act 1958 (Cth),* s 36(2)(a)

   There is no official hardcopy reprint of the entire Act. A copy of the relevant section is annexed to the written submissions and an electronic compilation of the entire Act as it was at the time of the Tribunal's decision (26 September 2012) is available at http://www.comlaw.gov.au/Details/C2012C00676

Authorities

1. *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 225 at 232-233, 241-243, 248, 257-258, 284-286

2. *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 at 400 [36], 413 [75]

3. *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 299-300 [13]-[15], 302-303 [24]-[29]

Filed on behalf of the Appellant by:

Australian Government Solicitor
Level 42 MLC Centre
19 Martin Place
Sydney NSW 2000
DX 444 Sydney

Date of this document: 20 June 2014
Contact: Andras Markus
File ref: 14004709
Telephone: 02 9581 7472
Facsimile: 02 9581 7650
E-mail: Andras.Markus@ags.gov.au

4. *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 at 622 [15], 624 [20] - 625 [22]

5. *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at 440

6. *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 at 21-22 [61]-[65]

7. *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8 [20], 26 [73]

8. *NAGV and NAGW of 2002 v Minister for Immigration and Indigenous Affairs and Another* (2005) 226 CLR 161 at 176 [42]

9. *NALZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 270 at 281 [46] – 283 [59]

10. *Refugee Appeal No 74665/03* [2005] INLR 68 at [81]-[82], [90]-[91], [116]-[125]

11. *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152 at 167 [19], [25]

12. *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 481 [10], 487 [34], 489 [40], 490 [43], 500 [80]-501 [83], 502 [84], 513 [110]

13. *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at 24[15]-[16], 25-26 [19], 27 [24], 28 [29], 46 [93]-[94]; 47 [97], 48 [101]-[102]

14. *SZFDV v Minister for Immigration and Citizenship* (2007) 233 CLR 51 at 55 [15] – 56 [16]

Dated: 20 June 2014

Geoffrey Johnson SC
Telephone: (02) 8226 2344
Facsimile: (02) 8226 2399
Email: geoffrey.johnson@stjames.net.au

Justin Smith
Telephone: (02) 9231 6351
Facsimile: (02) 9221 5386
Email: jsmith@selbornechambers.com.au