



HIGH COURT OF AUSTRALIA

1 May 2013

COMMISSIONER OF TAXATION v UNIT TREND SERVICES PTY LTD
[2013] HCA 16

Today the High Court unanimously allowed an appeal from a decision of the Full Court of the Federal Court of Australia concerning the interpretation of s 165-5(1)(b) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act").

Unit Trend Services Pty Ltd ("Unit Trend") is the representative member of a GST group of companies which, at the relevant time, included Simnat Pty Ltd ("Simnat"), Blesford Pty Ltd ("Blesford") and Mooreville Investments Pty Ltd ("Mooreville"). Simnat was the developer of residential building unit projects. When construction of the projects was at an advanced stage, Simnat sold the projects for their then value as going concerns to Blesford and Mooreville, which completed the projects and sold the completed units.

The Commissioner of Taxation ("the Commissioner") issued a declaration to Unit Trend under the anti-avoidance provisions in Div 165 of the GST Act negating a total GST benefit in excess of \$21 million. This declaration was contested by Unit Trend in the Administrative Appeals Tribunal ("the AAT"), which found in favour of the Commissioner. The AAT found that the companies were engaged in a "scheme" under s 165-10(2) of the GST Act. The GST benefit got from the scheme, which Div 165 was being invoked to negate, was the benefit obtained as a result of intermediate sales by Simnat to Blesford and Mooreville of a going concern. The GST benefit reflected the amount agreed to be paid to Simnat by Blesford and Mooreville as the consideration for the intermediate sales, which brought about an uplift in the intermediate cost base of the units supplied by them to buyers of the units. As a result, the amount of GST payable by Unit Trend was less than it would have been had the scheme not existed.

The AAT's decision was subsequently overruled by the Full Court in favour of Unit Trend. The Full Court held that the GST benefit obtained by Unit Trend was attributable to the making of a choice, election, application or agreement expressly provided for by the GST Act and, therefore, Div 165 did not apply.

On appeal by special leave to the High Court, the issue before the Court was whether the GST benefit obtained by Unit Trend was not attributable to the making of a choice, election, application or agreement that was expressly provided for by the GST Act. The High Court unanimously held that the phrase "not attributable to" in s 165-5(1)(b) is concerned with whether the GST benefit in question is not one to which the taxpayer was entitled by exercise of a statutory choice.

Reference to the undisputed facts showed that the GST benefit in question was not attributable to the making of a statutory choice by Unit Trend provided for by the GST Act. The GST Benefit was, therefore, negated by the anti-avoidance provisions in Div 165.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.