HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Commissioner of Taxation
Appellant

and

Gordon Stanley Merchant
First Respondent

and

GSM Pty Ltd ACN 074 508 124
Second Respondent

Appeal S157/2025

BETWEEN:

Gordon Stanley Merchant
First Appellant

and

GSM Pty Ltd ACN 074 508 124
Second Appellant

and

Commissioner of Taxation
Respondent

Appeal S158/2025

RESPONDENT'S SUBMISSIONS IN APPEAL S158/2025
APPELLANT'S SUBMISSIONS ON THE CROSS-APPEAL AND NOTICE OF CONTENTION IN APPEAL S157/2025

Part I: Certification

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

Part II: Concise Statement of the Issue

2. The Merchant Parties'[1] case suffers from a fundamental misunderstanding of the role of the "counterfactual" in the analysis of dominant purpose in s 177D and s 177E of Part IVA of the *Income Tax Assessment Act* 1936 (Cth) (**ITAA 1936**).

3. Their case also misapprehends the operation of Part IVA more generally. No construction of Part IVA "prevents a taxpayer" from doing anything. Part IVA allows the Commissioner to cancel a tax benefit where, having regard to the eight enumerated factors in s 177D(2), it would be concluded that one of the persons who entered into or carried out the scheme or any part of the scheme did so for the dominant purpose of enabling a taxpayer to obtain a tax benefit in connection with the scheme.

4. Nor does the "concession" made by the Commissioner with respect to a third party sale assist the Merchant Parties. The Commissioner acknowledged below that, in the ordinary course and without additional facts, it would not be concluded that the dominant purpose of a taxpayer, who sold shares to a third party in an arm's length market value transaction (such that the taxpayer made a capital loss), was to obtain a tax benefit.[2] That is because, even if the taxpayer's subjective purpose included crystallising a capital loss, the proper application of the factors in s 177D(2) having regard to other objectively ascertainable purposes (such as "cutting one's losses"[3]) may result in the conclusion that the dominant purpose, objectively determined, of a participant in the scheme was not to obtain a tax benefit.

5. But this appeal cannot be resolved by comparing the facts of this case to a sale to an independent third party: c.f. Merchant Primary Submissions (**MPS**) at [2]. Such comparison obscures the objective, fact intensive, analysis required by s 177D(2) and assumes (incorrectly) that Part IVA can be approached by analysing categories. Nor can

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1 The Appellants, Mr Merchant and his entity GSM, are referred to in these submissions collectively as the Merchant Parties.

2 Appeal T2-97, l 34 to T2-98, l 17; T2-100, ll 7-17.

3 FC[40] (Logan J); see also Appeal T2-97, l 38.

the appeal be resolved by asking whether, as a matter of principle, s 177D puts a taxpayer to an election. The real issues are:

(a) whether the purpose analysis required by s 177D involves a "counterfactual enquiry" of the kind contended for by the Merchant Parties; and

(b) whether the Full Court failed to consider the nature of the MFT and the GMSF such that their purpose analysis can be shown to be infected by error.

Part III: Section 78B Notice

6. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Facts

7. The facts as outlined at MPS[5]-[14] do not expose the process of reasoning that the primary judge and Full Court adopted in arriving at the conclusions described at MPS[14].

8. The ultimate finding that persons who entered into and carried out the BBG Share Sale Scheme did so for the dominant purpose of a taxpayer obtaining a tax benefit was reached after a careful analysis of the evidence by both Courts. In doing so, both Courts were invited by the Merchant Parties to consider whether the BBG Share Sale was explained by one or more commercial (non-tax) purposes. These were that the BBG Share Sale was undertaken: (a) to free up cash in the MFT: FC[223], [225]; (b) to secure exposure of the GMSF to the BBG Shares: FC[224], [226]; (c) to liberate cash from the superannuation environment: FC[225]; and (d) to permit Mr Merchant to retain control over the shares in BBG: PJ[267]-[268]; FC[226]. On appeal, the Merchant Parties contended that a further purpose was to obtain the highest price for the sale of Plantic: FC[220]-[222].

9. The Full Court (and the primary judge, to the extent put to his Honour) found on the evidence that none of the identified purposes was a genuine commercial purpose of the BBG Share Sale, holding that: ***first***, there was no objective need for cash to be injected into the MFT: PJ[293]-[310], [319]; FC[260]-[265]; ***second***, there was no evidence that there was an objective basis to conclude that moving the BBG Shares into the GMSF was commercially rational from a dividend or growth perspective, there being no need to use a share sale to liberate cash from the GMSF, and there being no foreseeable likelihood that the BBG Shares would return to paying a dividend: PJ[272], [331]; FC[272]-[275]; ***third***, the sale was inconsistent with the GMSF's investment strategy (and thus in breach

of superannuation regulatory requirements), and had the effect of depriving the GMSF of the capacity to pay Mr Merchant's pension: PJ[399]-[402]; FC[289]; ***fourth***, the sale did not need to occur to permit Mr Merchant to control the BBG Shares. The sale was designed such that a capital loss was crystallised with economic ownership being retained: PJ[369]; FC[272], [276]-[292]; and ***fifth***, the BBG Share Sale had no effect on the sale price of Plantic: FC[246]. In addition, the primary judge held (and it was accepted on appeal) that timing was significant in the assessment of dominant purpose as the sale took place in the context of it being anticipated that: (a) the MFT would sell the Plantic shares; (b) loans from related parties to Plantic would be forgiven to increase the value of those shares prior to the sale; and (c) the MFT would not otherwise have sufficient capital losses available to offset the anticipated capital gain that would crystallise upon such a sale: PJ[343]-[364], [379]-[380]; FC[287]-[288].

10. In light of those findings, the primary judge considered each of the eight factors in s 177D(2), and held that every one of them weighed in favour of a conclusion that the dominant purpose of a person who entered into the scheme was to obtain a tax benefit: PJ[406] (see also [364], [370], [380], [383], [390], [400], [402], [404]). That conclusion was inevitable given that: (a) each of the commercial purposes asserted by the Applicants as explaining the BBG Share Sale were rejected; and (b) the consequent finding of the Full Court that the scheme effected the crystallisation of a capital loss by the sale of the BBG Shares without any change in the effective economic ownership and control or the ongoing exposure to the risks and benefits of holding those shares: FC[233], [272], [291]-[292], [296].

11. In that context, there are four errors which should be observed in the recitation of the facts by the Merchant Parties.

12. ***First***, contrary to MPS[8], the tax benefit to the MFT did not crystallise *only if* the MFT was able to sell the Plantic Shares at a future date. As explained below, a tax benefit arises when the capital loss is incurred: s 177C(1)(ba). The full economic benefit of that tax benefit may not be obtained until corresponding gains are made (unless those gains have already been realised in the same year). But the existence of the tax benefit is not conditional upon the existence of a gain.

13. ***Second***, the consequences set out in MPS[8] do not align with the asserted purposes of the BBG Share Sale which were put to the Full Court: see [9] above. While the consequences set out at MPS[8(4)]-[8(5)] were raised as consequences in fact, they were

not matters said to be objectively significant so as to be a purpose that explained the transaction. Control of the BBG Shares (MPS[8(1)]) would be retained regardless: see [9] above. And the consequences set out at MPS[8(1)]-[8(5)] ignore the critical *adverse* consequences of the BBG Share Sale, being that:

(a) the GSMS, as trustee of the GMSF, failed to give effect to its investment strategy (in contravention of s 34 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (the **SISA**)), breached the sole purpose rule in s 62 of the SISA, and breached the requirements of s 65 of the SISA by using the resources of the GMSF to give financial assistance to a member: FC[93]-[94][4]; and

(b) by returning the GMSF to the accumulation phase (as occurred), the fund (which could otherwise generate income tax-free and distribute capital and income tax free) became subject to tax on its earnings and could no longer pay Mr Merchant's pension, which needed to be replaced from a source that did not have the benefits of the superannuation environment. Further, the BBG Shares replaced 74.4% of the cash assets of the GMSF, decreased the income to the GMSF, and there was no evidence that the shares were likely to start to pay dividends: PJ[401].

14. ***Third***, the proposition at MPS[8(5)], that a consequence of the BBG Share Sale was that Mr Merchant and his entities did not need to take on additional debt, is contrary to the findings of fact made below. The MFT had ample funding available as at 4 September 2014 to meet the forecast funding requirements of Plantic (PJ[288], [295], [309]) given the MFT's existing cash reserves, the way in which it had funded expenditure previously, and the fact that a sale of Plantic was objectively likely (PJ [288], [295], [309]; [288], [295], [309]; [377]; FC[260], [288]).

15. ***Fourth***, the Board of Kuraray resolved to approve the acquisition of Plantic if the GSM Loan and Tironui Loan were forgiven (MPS[9]), leading Logan J to conclude that Kuraray was only interested in acquiring shares in Plantic if that company were free of debts owed to Mr Merchant's entities. However, that does not provide a complete picture. The loans were fully recoverable and the forgiveness of the debts, rather than their repayment, was insisted on by the MFT despite Kuraray's concerns: PJ[531]-[537]; FC[350], [352], [354]-[355].

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[4] Also *Merchant v Commissioner of Taxation* [2024] AATA 1102 at [127]-[133], [150]-[151], [159]-[163].

Part V: Argument – The Appeal in S158/2025

16. The Merchant Parties correctly identify at MPS[16] the test to be applied under s 177D to ascertain whether the dominant purpose of a person who entered into or carried out a scheme was to obtain a tax benefit for a taxpayer. However, the analysis to be conducted under s 177D occurs in respect of an identified tax benefit, within the meaning of s 177C.

17. Pursuant to s 177C(1)(ba), a tax benefit is obtained where a capital loss is incurred by the taxpayer during a year of income where the whole or a part of that capital loss *would not have been, or might reasonably be expected not to have been*, incurred by the taxpayer during the year of income if the scheme had not been entered into or carried out.

18. Part IVA provides two ways to determine whether a *tax effect* (in this case, a capital loss *not being incurred* by a taxpayer) would have occurred or might reasonably be expected to have occurred had a scheme not been entered into or carried out:

    (a) Section 177CB(2)—the "annihilation" approach[5]—provides that a decision that a tax effect *would have occurred* if the scheme had not been entered into or carried out must be based on a postulate that comprises only the events or circumstances that actually happened or existed (other than those that form part of the scheme).

    (b) Section 177CB(3)—the "reconstruction" approach[6]—provides that a decision that a tax effect *might reasonably be expected to have occurred* if the scheme had not been entered into or carried out must be based on a postulate that is a reasonable alternative to entering into or carrying out the scheme.

19. This case is not about the identification of a tax benefit. The taxpayer conceded before the primary judge that, applying the annihilation approach in s 177CB(2), the BBG Share Sale Scheme resulted in the MFT obtaining a tax benefit: PJ[243]. That concession is significant. That is because the Merchant Parties also accept that any sale of an asset for a loss is a scheme by which a tax benefit is obtained, and the question of whether Part IVA applies is determined *wholly* by whether it would be concluded, on an objective analysis, that the dominant purpose of those entering into the scheme was to obtain a tax benefit for a taxpayer: MPS fn. 8.

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5 Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 Explanatory Memorandum at [1.77]-[1.81].

6 Ibid at [1.85]-[1.89].

20. This exposes the fundamental problem in the Merchant Parties' submissions. While accepting (correctly) that the identification of dominant purpose requires a consideration of the objective matters prescribed by s 177D(2), the premise of the Merchant Parties' appeal is that if they show that the different entities involved in the scheme were subject to different legal, commercial and tax considerations (MPS[30]) or that there were some commercial consequences that would not be obtained in a "routine" counterfactual (MPS[36]), they will have shown that the BBG Share Sale Scheme was not sufficiently different to an ordinary disposition of shares to a third party to attract Part IVA: MPS[30], [60]. This mistakes the relevance of alternative postulates or "other possibilities"[7] in the purpose enquiry. It is inconsistent with the focus of s 177D on *dominant*, as opposed to sole, purpose.[8] And it falls directly into the "false dichotomy"[9] between a scheme having a rational commercial decision and the dominant purpose of tax avoidance.

21. As the majority correctly observed below, there is no rule that a sale to a third party that results in a realisation of a capital loss can never attract Part IVA—whether it applies depends upon the other features of the transaction (such as whether it involves a wash sale): FC[234]. And in any event, seeking to analogise the facts of this case to a disposition of shares by a taxpayer to a third party is apt to mislead because it obscures relevant matters that go to the application of the eight factors in s 177D. A comparison of the BBG Share Sale Scheme to a disposition of shares to a third party operates to reveal the presence of the relevant purpose, not its absence.

22. The question for this Court does not depend upon an analysis of high principle as to whether s 177D is intended to interfere with property rights or whether the Commissioner's concession below implies something about how s 177D intersects with the rights inherent in property ownership: c.f. MPS[2]. The conclusion of both Courts below, that at least one of the participants in the BBG Share Sale Scheme entered into it for the dominant purpose of the MFT obtaining a tax benefit, can only be reversed by showing that, upon a consideration of each factor in s 177D(2), such a conclusion was in error. For the reasons set out below, the grounds of appeal do not establish such an error.

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7 *Commissioner of Taxation v* ***Hart*** (2004) 217 CLR 216 at [66].

8 See s 177A(5); *Commissioner of Taxation v* ***Spotless*** *Services Ltd* (1996) 186 CLR 404 at 415-6.

9 *Spotless* (1996) 186 CLR 404 at 415; *Hart* (2004) 217 CLR 216 at [64]; *Commissioner of Taxation v Macquarie Bank Ltd* (2013) 210 FCR 164 at [165], [216]; *Commissioner of Taxation v PepsiCo, Inc* (2025) 424 ALR 294 at [204].

Ground 1(a): Alleged Failure to Account for the Difference in Legal Entities and Regimes

The Differences in Legal Entities

23. As a general proposition, there is no issue of principle between the parties that the matters set out in MPS[21]-[24] describe general differences between the legal rights and obligations pertaining to discretionary trusts and superannuation funds and the different tax treatments afforded to them. But two observations should be made.

24. *First*, at MPS[20], the Merchant Parties submit that the acquisition of shares by Mr Merchant's entities to maintain control of BBG was a "proper and lawful purpose": see also MPS[41], [48]. To the contrary, in relation to the BBG Share Sale, this purpose caused GSMS to breach the sole purpose rule in s 62 of the SISA (a civil penalty provision): see [13(a)] above. Moreover, as ultimate control of the shares already resided with Mr Merchant (FC[272]), a consideration of the other possibilities available to the MFT (do nothing and maintain control or sell the shares to a third party and lose control) strongly suggests that the dominant purpose was to obtain a tax benefit for the MFT.

25. *Second*, also at MPS[20], the Merchant Parties submit that "it is a misapplication of s 177D to treat [the] MFT… and [the] GMSF… as though they are the same, such that there are no real, practical, commercial, or economic consequences of the BBG Share Sale apart from the identified tax benefit". The majority in the Full Court did not reject those consequences on the basis that the MFT and the GMSF were "the same". Rather, both at first instance and on appeal, their Honours rejected the contention that there was any relevant practical significance arising from the differences between the MFT and the GMSF. The majority acknowledged that there were differences between the superannuation environment and other trusts, but: (a) the BBG Shares were unlikely to pay dividends and impaired the ability of the GMSF to pay Mr Merchant's pension, such that there was no practical advantage to it of acquiring the shares (FC[273]; PJ[401]); (b) the contemporaneous evidence did not support that the BBG Share Sale was done to give effect to the GMSF's investment strategy (FC[200], [201]; PJ[335]-[339]); (c) the MFT did not require $5.8 million in cash at the relevant time, and Mr Merchant was able to withdraw cash from the GMSF if he wanted it (a finding of fact at trial from which there was no appeal): FC[260], [272]-[273]; and (d) the cash made available to the MFT was disproportionate to the value of the capital loss that it incurred: FC[274]-[275].

26. The primary judge applied the factors required in s 177D(2) and concluded that each weighed in favour of a conclusion that the BBG Share Sale was carried out to obtain the

admitted tax benefit: PJ[342]-[408]. No error was shown in that reasoning on appeal to the Full Court. In this Court, aside from the challenges made to the significance attributed by the Full Court to the GMSF holding BBG Shares in the superannuation environment, none of that reasoning is challenged. Instead, the Merchant Parties invite this Court to ignore the detailed findings of fact below and instead rely on general observations about differences between the superannuation environment and the legal treatment of discretionary trusts as demonstrating commercial purpose.

Significance of the Differences in Legal Entities

27. Accordingly, the issue in respect of ground (1)(a) is the Merchant Parties' assertion that the significance of some of the differences between the treatment of superannuation funds and trusts were erroneously dismissed, because the Full Court considered that the "protection of the assets" held in the GMSF was "not an advantage": MPS[26]-[27]. Four matters are identified by the Merchant Parties as demonstrating error.

28. ***First***, there was no evidence that moving funds out of the "restrictive environment" of superannuation (as asserted MPS[26]) was an advantage. Nor do the Merchant Parties point to any advantage in moving cash out of the tax-advantageous environment of the GMSF, or deal with the fact that the cash was replaced with an asset (the BBG Shares) that was not earning income and was not likely to do so: FC[198].

29. ***Second***, at MPS[27], the Merchant Parties contend that the GMSF's inability to pay a pension following the BBG Share Sale was "at best" a neutral consideration given the finding that the pension could have been funded from elsewhere. However, the reasons the Merchant Parties complain of at FC[273] were dealing with an express submission below that "the BBG Shares were given the advantages of the superannuation environment",[10] which was said to be an objectively ascertainable purpose for the BBG Share Sale. The inability to pay a pension is not neutral: the objective benefit of cash in the superannuation fund (which had been in pension phase, such that its earnings were tax-free and distributions were permissible) was that it provided a tax-free way for Mr Merchant to derive income of approximately $500,000 per annum: PJ[55], [93], [399]. The majority was correct to describe the inability to pay the pension and the adverse consequences set out at [13(b)] above as not being "an advantage" to the GMSF.

[10] ABFM 8 at p 84: Merchant Parties' Appeal Submissions in the Full Court at [26]. See also FC[224].

30. ***Third***, also at MPS[27], the Merchant Parties are wrong to submit that the use of the word "advantage" reflects a judgment on the merits of the acquisition, rather than on the relevant change in financial position or other consequences for the GMSF and Mr Merchant. The case below was put by the Merchant Parties on the basis that there were five objectively ascertainable purposes of the BBG Share Sale that militated against the conclusion that the dominant purpose was to obtain a tax benefit: FC[219]. One of those was said to be there was an "advantage" in Mr Merchant holding the BBG Shares in the superannuation environment. The burden of showing that, objectively, was therefore something which Mr Merchant took on to prove. The Full Court's conclusion to the contrary was simply a rejection of the submission put.

31. ***Fourth***, at MPS[28]-[29], the Merchant Parties criticise the majority's description of the BBG Shares as a "risky asset" at FC[273] as an incorrect recording of the primary judge's findings that failed (so it is said) to take into account the potential for the risk of holding shares in the concessionally taxed superannuation environment to pay off. However, read in context, FC[273] is no more than a paraphrasing of the whole of PJ[398], where the primary judge explained that the BBG Shares were a riskier asset than the cash they replaced, were unlikely to earn dividend income, and would not be sold by the GMSF in the short to medium term because Mr Merchant would not countenance a reduction in the Merchant Group's shareholding in BBG.

32. The last of those findings by the primary judge is also the reason why there was no error by the Full Court in failing to address a potential for appreciation in value. The potential for appreciation of the BBG Shares in a tax-favourable environment could hardly be said to be a significant factor in ascertaining dominant purpose as it followed from the primary judge's findings of fact that that appreciation in value would not be crystallised by Mr Merchant ever selling (so as to take advantage of the tax-favourable environment).

33. In any event, there was no evidence before the primary judge that the BBG Shares were undervalued and a good investment, such that appreciation was objectively likely: PJ[331]. The assertion that an objectively ascertainable purpose of the scheme was to expose the GMSF to the potential for growth in the BBG Shares was entirely speculative.

34. These are the only matters said to have been erroneously dismissed by the Full Court as arising from the different nature of the GMSF and MFT as legal entities. For the reasons set out above, each is a criticism without substance.

35. Further, none of these criticisms supports the ultimate submission made at MPS[30] that the majority's conclusion was, in effect, a conclusion that obtaining a tax benefit *ipso facto* prevails over the other legal and economic consequences of the shares moving from one legal entity to another. MPS[30] suggests that if the Merchant Parties show *a* commercial purpose, they will have established error in the ultimate conclusion as to the application of s 177D. That assumption falls into the false dichotomy explained by this Court in *Spotless* and *Hart.* In the latter case, Gummow and Hayne JJ explained:[11]

> …there is a false dichotomy between a "rational commercial decision" and "the obtaining of a tax benefit as 'the dominant purpose of the taxpayers in making the investment'". Pointing to the "commercial end" of the scheme reveals the adoption of the same, or at least a substantially similar false dichotomy.

36. To discharge their burden, the Merchant Parties had to show, not just that there were other purposes to the scheme, but that those purposes were such that the tax purpose did not predominate.[12] As explained above, the primary judge's conclusion as to dominant purpose, which was upheld on appeal, arose only following a rejection of the commercial significance of holding the BBG shares in the GMSF *and* a careful analysis of the factors in s 177D(2). In this Court, no submission is made to the predomination of the contended for commercial purposes over the tax purpose. Ground 1(a) should be dismissed.

Ground 1(b): The Counterfactual Enquiry

The Nature of the Enquiry

37. Ground 1(b) is premised upon the contention that the question which the majority was required to answer, when considering alternative possible forms of transaction as part of the assessment of dominant purpose, was: "would this alternative form of transaction achieve all of the same commercial consequences as the share sale that was actually entered into?": MPS[45]. This premise is incorrect. It conflates the "tax benefit" analysis required by s 177C and the "purpose" analysis required by s 177D.

38. ***First***, as set out above, a tax benefit may be identified, within the meaning of s 177C, using an annihilation or a reconstruction approach. Adopting the *annihilation* approach, the tax benefit is identified assuming that none of the steps of the scheme occurred:

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11 *Hart* (2004) 217 CLR 216 at [64] quoting *Spotless* (1996) 186 CLR 404 at 415.

12 *Commissioner of Taxation v Sleight* (2004) 136 FCR 211 at [79], [113]; *Peabody v Federal Commissioner of Taxation* (1993) 40 FCR 531 at 548 (aff'd (1994) 181 CLR 359).

s 177CB(2). This may be contrasted to the *reconstruction* approach, for which s 177CB(4) requires one to have particular regard to the substance of the scheme and non-tax results and consequences for the taxpayer of the scheme. This may mean, in a particular case, that if an alternative postulate does not achieve a crucial non-tax result of the scheme, it might not be a "reasonable alternative to the scheme" for the purposes of identifying the tax benefit. But that exercise is only required where the *reconstruction* approach has been taken. Here, as the *annihilation* approach was taken, s 177CB(4) does not arise for consideration.

39. In the context of applying the purpose test required by s 177D(2), it is uncontroversial that s 177D(2) requires an analysis of each of the factors having regard to a comparison between the scheme in question and "other possibilities" (which include but are not limited to the alternative postulate): see Gummow and Hayne JJ in *Hart* at [66] and Callinan J at [94].[13] These "possibilities" are not necessarily alternative postulates that are required to satisfy the *"might reasonably be expected"* test in s 177C or the s 177CB(4) test. In asserting that the Full Court was required to conduct a "full counterfactual enquiry" (MPS[45]), the Merchant Parties' submissions seek to apply a s 177CB(4) style analysis to another "possibility".

40. What s 177D instead relevantly requires, irrespective of whether the tax benefit is identified using the annihilation approach or the reconstruction approach, is an enquiry as to the objective significance of any differences between the tax and non-tax consequences of the scheme and the "other possibilities", having regard to the factors mandated by s 177D(2).

41. There is no disagreement that the "other possibilities" referred to in *Hart* might include an "ordinary" or "routine" manner of entering into a transaction (MPS[32]), although it is not limited to such a routine form. A comparison of the scheme to another "possibility" of this kind is a useful analytical tool to test whether the scheme is a contrived or artificial version of a standard commercial transaction. In this case, a comparison with a sale to a third party exposes the incongruity between the scheme and the so-called routine transaction—ownership and control was not relinquished by the scheme but it would have been relinquished by the routine transaction. That is a matter relevant to a number of the s 177D(2) factors, as explained above.

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[13] (2004) 217 CLR 216.

42. But while a sale to a third party might be another "possibility" that is useful for the analytical exercise referred to above, it is not a "counterfactual" or alternative postulate in the s 177C and s 177CB sense. The term "counterfactual enquiry" is apt to confuse the task. Given the tax benefit in this case was identified on an annihilation approach (which was not contested by the Merchant Parties), the relevant counterfactual is, and can only be, that required by s 177C, being that the BBG Share Sale did not take place (an *annihilation*). It was not a sale of shares on-market (c.f. MPS [36]) as that would involve a *reconstruction* and would in any event fail to achieve the Merchant Parties' asserted purpose of maintaining control of the BBG Shares.

43. ***Second***, contrary to submissions made at MPS[32]-[33], the comparison with other possibilities in the context of analysing purpose is not an exercise that is intended to isolate schemes that make no sense without the tax benefit as the only schemes to which s 177D applies. *Hart* and *Spotless* are examples of such cases. But the observations made on the particular facts in those cases do not set the metes and bounds of the application of Part IVA. To the contrary, this Court was clear in *Hart* that whether the manner in which the scheme was formulated is explicable only by the taxation consequences is "not decisive" of purpose (s 177D(2)(a)),[14] and that whether "the substance of the transaction (tax implications apart) could more conveniently, or commercially, or frugally have been achieved by a different transaction or form of transaction" is but an aspect of the analysis.[15] That is because "[a]lways the question must be whether the terms of the Act apply to the facts and circumstances of the particular case",[16] applying the eight factors in s 177D(2).

44. Further, confining s 177D to schemes that make no sense without the tax benefit is to perpetuate the false dichotomy explained in *Spotless*, because it assumes that showing that even *a single* rational commercial outcome was achieved by the scheme is sufficient to take the transaction outside Part IVA. As already explained, that is wrong. A scheme can be both tax driven and bear the character of a rational commercial decision,[17] because s 177D is concerned with the dominant, as opposed to sole, purpose of the participants. By adopting a dominant purpose test, Part IVA admits the possibility that a scheme will

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14 (2004) 217 CLR 216 at [58].

15 (2004) 217 CLR 216 at [94].

16 (2004) 217 CLR 216 at [52].

17 *Spotless* (1996) 186 CLR 404 at 416; *Hart* (2004) 217 CLR 216 at [52].

attract its operation even though a subordinate purpose of the scheme is not fiscal. That subordinate purpose may result in certain commercial consequences being obtained from the scheme, which may or may not be obtained in any alternative possibility. But that does not mean that a conclusion cannot be reached that the dominant purpose of a participant in a scheme was to obtain a tax benefit, even if the implementation of the scheme was the only way to achieve all the commercial consequences which were in fact achieved, having regard to the possibilities. The question in such a case will simply be whether the commercial consequences were such that the fiscal purpose did not predominate, having regard to the matters set out in s 177D(2).

45. The submission at MPS[59] demonstrates that the Merchant Parties put their case on the basis that they can succeed on the appeal simply by establishing the proposition that "the presence of the consequences [identified at MPS[50]-[58]], taken as a whole, means that it cannot be said that the BBG Share Sale had 'no explanation' other than the taxation benefit, or that without that benefit the sale 'would have made no sense'". For these reasons, that proposition does not engage with the enquiry mandated by s 177D. It is, therefore, not something which, if established, would result in the Merchant Parties succeeding. In this case, in any event, the primary judge and the Full Court, having regard to all of the evidence, rejected the proposition that there was any objective significance to the non-tax consequences which the Merchant Parties contended below demonstrated a non-fiscal dominant purpose. Applying s 177D(2), their Honours then concluded that the objectively ascertainable purpose of at least one participant in the scheme was to obtain a tax benefit for the MFT. As the Merchant Parties do not go further and seek to displace these correctly reasoned findings of the trial judge, which were not disturbed on appeal, it is sufficient to dispose of Ground 1(b) by rejecting the proposition that s 177D will apply only if the scheme had "no explanation" that was not fiscal.

The Asserted 'Counterfactual'

46. The second step in the Merchant Parties' argument is the assertion that the correct "counterfactual" to consider is the sale of the BBG Shares to a third party, and that barring the example of a wash sale, such a sale would not have attracted the operation of Part IVA: MPS[37]-[38]. As has already been explained, that submission proceeds from the erroneous premise with respect to the role of the "counterfactual". But three additional difficulties attend this step in the argument.

47. ***First***, contrary to the assertion at MPS[37], the Commissioner did not concede that had the BBG Share Sale "entailed a sale not to a related party but to an unrelated third party, the dominant purpose of the sale would not have been to obtain a tax benefit." Aside from that proposition erroneously conflating the purpose of one or more of the participants in the scheme with the purpose of the scheme, the Commissioner made no such concession. As set out at [4] above, the acknowledgement that the Commissioner in fact made was that in the ordinary course *and without additional facts*, it would not be concluded that the dominant purpose of a taxpayer, who sold shares to a third party in an arm's length market value transaction (such that the taxpayer made a capital loss), was to obtain a tax benefit. In such a circumstance, the application of the matters in s 177D(2) would not ordinarily result in a conclusion that the objective purpose of "cutting one's losses"[18] is predominated by the purpose of obtaining a tax benefit. But there was (and is) no dispute that an on-market sale may attract Part IVA: MPS[37]. A wash sale that results in the crystallisation of a capital loss but no divesture of the risks and benefits of ownership is an example: FC[234].

48. ***Second***, as the Merchant Parties acknowledge at MPS[45], there was no error in the Full Court considering, as one of the other possibilities referred to in *Hart*, the "ordinary" or "routine" manner in which a share sale transaction might take place. This was the comparison that was invited by the Merchant Parties: FC[233]. The analysis which flows from that comparison leads to the conclusion that the sale was contrived. As the Full Court explained, Mr Merchant had ultimate control of the BBG Shares and, in effecting the BBG Share Sale, did not divest himself of that control, or the risks and benefits of ownership. Those facts objectively focus close attention on the capital loss as the dominant purpose of the sale: FC[233].[19]

49. Moreover, the Full Court was correct to conclude that if there would not be a divestment of the BBG Shares because Mr Merchant was not willing to relinquish control (as the primary judge found), "one is outside the paradigm example of a sale to an arms-length party": FC[235]. Thus, far from demonstrating that the objective purpose of the BBG Share Sale was not fiscal, the comparison to an on-market sale highlights the dominant tax avoidance purpose of the transaction. That is particularly so given that, contrary to the proposition in the second last sentence of MPS[45], none of the allegedly desirable

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18 FC[40] (Logan J).

19 See also *Noza Holdings Pty Ltd v Federal Commissioner of Taxation* (2011) 82 ATR 338 at [315].

commercial consequences were made out on the facts, such that the only consequence of any objective significance of the scheme was the crystallisation of the capital loss.

50. ***Third***, the Commissioner's concession is said at MPS[39] to reflect the fact that an ordinary incident of property ownership is the power to sell or dispose of the property, and that this is recognised by Part IVA and the CGT regime in the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**). That proposition suffers from two deficits in analysis.

51. The first is that it misapprehends the relationship between Part IVA and the CGT regime (and the other provisions of the Act more generally). Part IVA is predicated on a "tax benefit" being obtained, including one involving a capital loss arising from the disposal of property: ss 177C(1)(ba), 177F(1)(c). It applies after a person has exercised their property rights in respect of property and after other relevant provisions of the Act have been applied.[20] It is then given statutory precedence by s 177B. Thus, contrary to the final sentence of MPS[39], Part IVA is *expressly* intended to override the ordinary operation of the CGT regime where a tax benefit has been obtained in connection with a scheme attended by the requisite dominant purpose of a participant.

52. The second deficit is that it is not possible to discern a legislative policy in the CGT regime that an owner of property is *entitled* to take advantage of the regime to realise losses at a convenient time: c.f. MPS[40]. A disposal of property may have the effect of crystallising a loss at a convenient time. But the CGT regime is subject to a multitude of rules about when and how gains and losses arise: ITAA 1997 Division 104, e.g. s 104-15. Even CGT event A1 (of which the Merchant Parties assert the MFT was entitled to avail itself in selling the BBG Shares) may occur by operation of law, rather than by choice: ITAA 1997 s 104-10(2). And as obtaining a capital loss is a tax benefit to which Part IVA is specifically directed, it is axiomatic that a sale of property may, if attended by the relevant dominant purpose (objectively ascertained), engage s 177D.[21]

53. Thus, if a taxpayer exercises one of the ordinary incidents of ownership of property to dispose of it, but does so in a contrived or artificial manner and at a time and on terms that maximise their tax advantage, and the purpose is objectively ascertainable as the dominant purpose, Part IVA will apply. That is the express effect of Part IVA. The

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20 *Vincent v Commissioner of Taxation* (2002) 124 FCR 350 at [95]; Explanatory Memorandum, Taxation Laws Amendment Bill (No 2) 1998 (Cth) at [1.10], [1.59]-[1.65].

21 Explanatory Memorandum, Taxation Laws Amendment Bill (No 2) 1998 (Cth) at [1.68]-[1.69].

argument to the contrary is yet a further echo of old arguments that have not found favour in this Court since Part IVA was enacted.[22]

The Asserted Error by the Full Court

54. The analysis in MPS[41]-[42] proceeds from a false premise. While the "ordinary" or "routine" manner of selling shares was an appropriate "possibility" for the Full Court to consider in analysing dominant purpose, it was not a counterfactual or alternative postulate. Instead, as the Full Court explained, the proper analysis was to consider through the application of the s 177D factors whether any of the asserted non-fiscal purposes of the transaction were significant. There being no other challenge to the process of reasoning in applying s 177D(2), the Full Court was correct to dismiss the appeal. Indeed, once the primary judge rejected those asserted purposes as being significant, the focus on the maintenance of control only highlights that the dominant purpose of the scheme was fiscal. As that control could be maintained without a sale (FC[285]), it was, and remains, circular for the Merchant Parties to contend that it would be objectively concluded that the sale of the BBG Shares occurred to maintain control within the group: FC[235]. The clear prevailing purpose of the BBG Share Sale was the crystallisation of the capital loss.

55. Aside from the high-level assertion that the counterfactual enquiry miscarried, the Merchant Parties then advance three submissions in support of the proposition that the majority "wrongly compressed the counterfactual enquiry": MPS[43].

56. ***First***, at MPS[44], the Merchant Parties submit that the majority at FC[233] eschewed the relevant enquiry by departing from high level analogy and focussing on the facts in a close objective analysis. That proposition is not grounded in authority. The s 177D(2) analysis is not to be conducted at a high level of generality and the section itself specifies the limited and only matters that are to be considered when assessing dominant purpose.

57. Further, the comparison of the BBG Share Sale with a disposition to a third party highlights that while the form and the substance of the *transaction* is consistent, there is a disparity between the form and substance of the *scheme*: s 177D(2)(b). The form of the scheme was a sale, but the substance was that Mr Merchant crystallised a capital loss while retaining his economic interest: PJ[368]-[369]. As the Full Court correctly observed, Mr Merchant did not divest the Merchant Group of the risk of holding shares. He did not forgo the risks and benefits of continued ownership.

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[22] *Spotless* (1996) 186 CLR 404 at 414; *Hart* (2004) 217 CLR 216 at [51].

58. ***Second***, contrary to MPS[46]-[47], the majority did not find that *because* Mr Merchant was not prepared to divest himself of control and the benefit of the BBG Shares, s 177D did not permit him to exercise the ordinary incident of ownership of selling the shares, with its ordinary tax consequences. Rather, the majority observed that having chosen not to divest himself of the shares fully, the Merchant Parties' attempt to analogise the sale to an on-market arms-length transaction was inapposite: FC[235]. The BBG Share Sale resembled a wash sale: FC[234].

59. Without omitting parts of the quotation at FC[297] (as the Merchant Parties do at MPS[46]), what the Full Court in fact held was that "what stands this case apart from the 'routine' realisation of a capital loss to be offset against an actual or anticipated capital gain *are the objective facts that the BBG shares would not have been sold to an outside party*, the control of the shares and the effective economic ownership did not alter and there was no divestment of investment risk" (emphasis added). In context, this reasoning formed part of the majority's rejection of the submission below (repeated in this Court) that the primary's judge's finding of a dominant purpose had the effect of requiring taxpayers "to defer realising real capital losses until a time when those losses are unlikely to have any capital gains to offset": FC[295]. As the majority of the Full Court explained, to focus only on the fact that the BBG Share Sale crystallised a capital loss is to analyse the transaction at a level of abstraction above what is required by s 177D(2): FC[296]. It is to ignore the fact that the sale did not result in "any alteration in the effective economic ownership and control of the shares, with the outcome that the vendor realised a significant capital loss which could then be applied to offset a likely anticipated significant capital gain on a transaction which was well-advanced at the time of the sale": FC[296]. In describing the maintenance of control as "effective", the majority in the Full Court implicitly recognised the different status of the legal entities (as it explicitly recognised elsewhere: FC[272]-[273]). The majority also referred at FC[297] to the other findings of the primary judge with respect to the absence of a need for cash, the breach of the GMSF investment strategy, and the absence of a link with obtaining the best sale price for Plantic (all of which are omitted at MPS[46]). It was on the basis of all of these findings that it was concluded that the persons who entered into and carried out the BBG Share Sale Scheme did so for the dominant purpose of obtaining a tax benefit in connection with the scheme: FC[297]. That was plainly correct.

60. Further, the proposition in the final sentence of MPS[46], that the Full Court erred at FC[297] by treating the absence of a change in control of ownership as conclusive,

divorces the reasons from their context. The submission with which the Full Court was dealing in that paragraph was that the capital loss was not contrived. It was that submission alone that was rejected in that paragraph and in FC[296]. It cannot be read as answering the entirety of the question raised by s 177D.

61. ***Third***, the Merchant Parties then advance a series of propositions that are said to have involved "the majority erect[ing] a series of further counterfactuals, variously said to achieve singular consequences of the BBG sale, without considering whether any of these other alternatives could meet all the consequences of the BBG sale": MPS[49]. Aside from misdescribing the process that the Court in fact took, this was an acceptable tool in the context of the analysis of purpose. It was not a "counterfactual" analysis.

62. The submissions made by the Merchant Parties at MPS[50]-[58] are either made at too high a level of generality to assist, or are contrary to the unchallenged findings below:

(a) At MPS[50], the Merchant Parties criticise the observation that Mr Merchant could have retained control of the BBG shares by "doing nothing at all" (FC[285]), because "on that alternative postulate *none* of the other consequences would have been achieved for Mr Merchant and the Merchant Group more broadly". That submission assumes success in showing that there were other consequences of objective significance. As each of the consequences posited below were held not to be significant, and Ground 1(a) of the appeal does not show any error in the Full Court's treatment of the distinction between the superannuation environment and trusts, this submission proceeds on a false premise that there were such consequences of relevance. Moreover, the counterfactual "do nothing at all" was the counterfactual for the purposes of identifying the tax benefit under s 177C pursuant to the annihilation approach. That alternative *possibility* is thus one of real relevance to the assessment of whether the participants in the scheme carried it out for the purposes of obtaining a tax benefit, especially in circumstances where the maintenance of control was argued to be a substantial purpose.

(b) At MPS[51], the Merchant Parties also criticise the Full Court's finding that there was "no objective explanation why the maintenance of control purpose required the sale to be timed as it was" (FC[288]), on the basis that the timing of the sale was not explained by any anticipated tax benefit in connection with the sale of Plantic. That submission is not open on this appeal, it being contrary to the findings the

primary judge made (accepting Mr Merchant's own evidence: PJ[314], [316]) that there was a concern that the trading window might close (PJ[376]) and "it was objectively likely that Plantic would be sold and there was no real point in not proceeding with the BBG Share Sale at a time when it was known to be possible": PJ[377]; FC[288]. Further, a sale of the BBG Shares after Plantic had been sold would no longer support the asserted purpose of meeting the MFT's funding needs (for Plantic), thereby highlighting the tax avoidance purpose of the BBG Share Sale.

(c) The submissions at MPS[52]-[54] ignore the fact that the primary judge found that the BBG Share Sale was not undertaken to free up cash for the MFT: PJ[319]. Despite the evidence led at trial that Mr Merchant had an aversion to debt, the Full Court's observation was that this evidence could not be objectively reconciled with the history of drawdowns from the NAB margin loan and the new CBA facility with an (increased) limit to $35 million: FC[264]-[265]. The Full Court also referred with approval to the findings of the primary judge, who relied on the history of using facilities to fund the MFT as a reason why the BBG Share Sale was not undertaken for the purposes of obtaining cash (PJ[319(c)]) and rejected the evidence that Mr Merchant was not involved in the decision to apply for the CBA loan facility in 2014: PJ [306]-[307]. The primary judge rejected that evidence because of (amongst other reasons) Mr Merchant's aversion to debt: PJ[307]. Contrary to MPS[54], FC[264] does not suggest otherwise.

(d) MPS[55] is a challenge to the factual finding that there was no real objective commercial benefit to the liberation of cash from the GMSF. That challenge is contrary to the evidence. While it is true that withdrawing a sum from the GMSF to fund the MFT would have diminished the assets of the GMSF, the primary judge found on the evidence that the MFT was unlikely to need additional funding for Plantic: PJ[288], [295], [308]-[309]; FC[260], [265]. In any event, the BBG Share Sale itself diminished the assets of the GMSF by swapping an income producing asset (cash) with a non-income producing asset (the BBG Shares).

(e) For the same reasons, the assertion at MPS[57] and [58] that it was significant that the MFT retained its other assets and maintained its debt level is inconsistent with the primary judge's findings that the MFT was unlikely to need substantial additional funding for Plantic (see above at [14]). Judged objectively at the time the

scheme was implemented, it was at best a speculative commercial consequence that might arise. They were not matters which provided a basis to conclude that the dominant purpose of the scheme was other than fiscal.

63. Ultimately, the case below was not decided only on the basis that the BBG Share Sale Scheme involved a decision to crystallise a capital loss through a sale to a related party. The Merchant Parties failed at trial and on appeal because the courts below: (a) rejected that each of the five "practical, commercial and economic consequences" of the BBG Share Sale alleged to explain the transaction existed (or were of any weight in the analysis): FC[232], [237]-[290]; (b) found that the only meaningful consequences for the MFT were fiscal, whereas commercially the transaction was disadvantageous to the GMSF having regard to the riskiness of the BBG Shares and its inability to continue to pay Mr Merchant's pension long-term: FC[273]; (c) found that there was a marked distinction between the form and the substance of the scheme: s 177D(2)(b); PJ [368]-[370]; FC[296]-[298]; and (d) found that the timing of the sale, having regard to the MFT's likely sale of the Plantic shares and its accrued capital losses, was objectively consistent with the dominant purpose being fiscal: PJ[376]-[380]; FC[144], [287].

64. The difference between the majority and Logan J (in dissent) was that Logan J would have allowed the appeal below: (i) on the basis of a conclusion that the primary judge assessed the dominant purpose of the scheme by looking to identify the "actual purpose" of the participants (FC[32]); and (ii) placing weight on the fact that a sale to a third party would not have achieved the maintenance of control: FC[42]. The first of these conclusions is not the subject of this appeal. The latter demonstrates a divergence between form and substance that weighs in favour of the presence, not absence, of the requisite purpose (see [57] above).

65. The Merchant Parties thus failed to establish that the sale of shares to a related party that crystallised a capital loss, in anticipation of an impending capital gain, had "legal commercial and taxation considerations" that were: (a) supported by the evidence; or (b) of sufficient weight as to permit a conclusion—having undertaken an objective analysis of the factors set out in s 177D(2)—that the dominant purpose was other than to obtain a tax benefit.

66. In those circumstances, the conclusion was inevitable that the dominant purpose of at least one participant in the BBG Share Sale Scheme was fiscal. The appeal should be dismissed.

The Cross-Appeal and Notice of Contention in S158/2025

67. The Merchant Parties' proposed cross-appeal and notice of contention proceed upon two fundamental errors as to the nature of the enquiry dictated by s 177E and a mischaracterisation of the evidence before the primary judge. Each is addressed in turn.

The Effect of the BBG Share Sale Scheme on the Debt Forgiveness Schemes

68. At MPS[66], the Merchant Parties submit that if they are successful in establishing that the BBG Share Sale Scheme was not entered into or carried out for the purpose of obtaining a tax benefit, it could not be concluded that the dominant purpose of the Debt Forgiveness Schemes was to avoid tax on a distribution of profits from GSM and Tironui. That proposition is incorrect. The dominant purpose analysis required by s 177D and s 177E must be applied in accordance with the terms of each section, and in this case is to be applied to different schemes. Section 177D is concerned with an objective ascertainment of purpose of one or more participants in the BBG Share Sale Scheme, having regard only to the matters set out in s 177D(2). Section 177E is concerned with the intended outcome of the Debt Forgiveness Schemes, viewed from the position of the reasonable observer, to ascertain why the scheme had taken place,[23] having regard to the characteristics of the scheme and the objective circumstances in which the scheme was designed and operated.[24] In this case, that outcome (and the purpose of the scheme) was the avoidance of tax by Mr Merchant on the profits of GSM and Tironui (that reflect the forgiven debts) had the amounts been paid to him as dividends; whereas s 177D is concerned with whether the dominant purpose of one or more parties to the BBG Share Sale was for the MFT to obtain a capital loss. Thus, not only did the Debt Forgiveness Schemes concern different tax benefits and different taxpayers to the BBG Share Sale Scheme, the analysis required to assess purpose was fundamentally distinct.

69. Neither the primary judge's, nor the Full Court's, conclusions that at least one participant in the BBG Share Sale Scheme had the dominant purpose of tax avoidance was determinative of whether the dominant purpose of the Debt Forgiveness Schemes was also tax avoidance. Rather, the mere fact that the BBG Share Sale Scheme generated a capital loss was sufficient to support a finding that there was an expectation (objectively determined) that an amount equal to the total debt forgiven amounts would be sheltered

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23 *Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235 at [125].

24 *Commissioner of Taxation v Consolidated Press Holdings Ltd* (1999) 91 FCR 524 (***CPH FC***) at [174].

by that capital loss: PJ[487], FC[343]-[345]. That expectation existed regardless of whether the BBG Share Sale Scheme had a tax avoidance purpose. Therefore, as the Full Court correctly held at FC[344], "[t]he s 177D Determination is not relevant to a consideration of the purpose of the Debt Forgiveness Schemes."

70. Further, the BBG Share Sale was effected as part of structuring the sale of Plantic (PJ[316]), and the identification of the BBG shares to sell occurred by reference to the non-BBG capital losses being insufficient to absorb the additional Plantic capital gain (reflecting the debt forgiven amounts): PJ[161], [167]-[169], [355], [378], [406]. The existence of the non-BBG capital losses did not need to be "an identified component" of either scheme (c.f. MPS[66]); they are part of the surrounding circumstances that inform the purpose analysis.

The Asserted Counterfactual Error

71. The second fundamental error in the cross-appeal and notice of contention is the proposition that the Full Court was required to conduct a "counterfactual enquiry" that involves a consideration of whether "other possibilities … achieve the same commercial end": MPS[67], [69]. When applying s 177E, the *counterfactual* for the purposes of identifying a tax benefit is fixed by the statute: it requires an assessment of what would have occurred had a dividend been paid: s 177E(1)(c). There is nothing in s 177E akin to the counterfactual enquiry required by s 177C, and so questions of reasonable alternatives and whether the same commercial end is achieved (see s 177CB(4)(a)(ii)) do not arise.[25]

72. Although the enquiry as to the dominant *purpose* of the scheme in the context of s 177E may well involve a consideration of "the alternative ways in which the scheme could have been accomplished" (MPS[68]), the assertion that the only appropriate comparators are ones that "achieve substantially all the same consequences as the loan forgiveness schemes" (MPS[69]) is wrong. It is redolent of the counterfactual analysis required by s 177C, not the dominant purpose analysis required by s 177E. Neither the Full Federal Court's decision in *CPH*,[26] nor the majority of this Court's decision in *Automotive Invest*

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[25] Section 177E was enacted precisely because it is frequently not reasonable to expect that in the absence of the dividend stripping scheme, the actual conduct of the taxpayer would involve the distribution and taxation of company profits: Income Tax Laws Amendment Bill (No 2) 1981 (Cth) Explanatory Memorandum at p 14. For this reason, an attempt to identify dominant purpose by reference to the probable alternative conduct of the taxpayer is misplaced.

[26] *CPH FC* (1999) 91 FCR 524 at [174].

Pty Ltd v Federal Commissioner of Taxation[27] support the proposition (for which they are cited at MPS fn. 63) that the assessment of purpose in applying s 177E requires such an approach. A comparison of the scheme to another "possibility" is simply a useful analytical tool for s 177E for the same reasons given above in paragraph [41] in relation to s 177D; without such a comparison the analysis "is artificial and sterile": FC[356].

73. In any event, the specific arguments advanced in support of the "counterfactual error" must each be rejected.

74. ***First***, with respect to MPS[69], the majority in the Full Court was correct to consider other possibilities as to the way the debts could be dealt with prior to the Plantic sale. It contradicted the proposition that forgiveness was the only way of doing so. In fact, the debt forgiveness was "a major issue for the purchaser" requiring the provision of commercial comfort and warranties: FC[352]. That an element of the scheme created commercial friction suggests the *presence* of the requisite purpose; the majority did not find that was so simply because the loan forgiveness gave rise to a better tax outcome (c.f. MPS[69]). The fact that the other possibilities would give rise to "different commercial consequences" does not of itself demonstrate the absence of a dominant tax purpose or that the consideration of alternatives are "inappropriate comparators".

75. ***Second***, the assertion at MPS[68] that the majority erred by not considering the alternative ways in which *the scheme* could have been accomplished, and focussed only on the ways in which the related party loans could have been removed in different ways, responds to the way in which the submission was put to the Full Court below.[28] It also begs the question what alternative analysis ought to have been considered when, at MPS[69], the Merchant Parties only identify other ways referred to by the majority in which the debts owed by Plantic could have been addressed but nothing else.

76. ***Third***, neither the first nor the second criticism supports the assertion at MPS[70]-[71] that the dominant purpose of the loan forgiveness schemes was to facilitate the sale of Plantic for the highest ultimate return. Nor was that conclusion compelled by the majority's finding that "[e]ach of the GSM and Tironui debts was forgiven with the principal intended outcome that the MFT would receive a higher price for the Plantic shares…": FC[344]. What is not reproduced by the Merchant Parties in quoting that

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27 (2024) 98 ALJR 1245 at [112]-[117].

28 ABFM 8 at p 91: Merchant Parties' Appeal Submissions in the Full Court at [59].

finding at MPS[70] is the balance of the text, which continued "thereby deriving a higher capital gain that was objectively intended to be sheltered by the capital losses that the Merchant Group believed had been incurred on the transfer of the BBG shares."

77. Further, the submission that the dominant purpose of the loan forgiveness schemes was to facilitate the sale of Plantic for the highest return does not grapple with the Full Court's rejection of this argument below on the facts. As the Full Court explained: (a) "Mr Merchant was not willing to sell the Plantic shares without a debt forgiveness unless he was compensated for the loss of tax benefit that was expected to have been enjoyed. That evidence is consistent with the dominant purpose of the debt forgiveness being the obtaining of an expected tax benefit": FC[354]; (b) the origin of the debt forgiveness structure of the transaction was not something which had its genesis in any requirement suggested by Kuraray. Although the contract ultimately required the forgiveness of the loans, the debt forgiveness was the structure that Mr Merchant put forward: FC[355] (see also PJ[531]-[532]); (c) the evidence did not establish that the "intercompany debts could only be discharged within the Merchant Group by way of debt forgiveness": FC[352]; and (d) consequently, even though the "alternative ways in which the related party loans may have been addressed and the chronology of the events leading up to the forgiveness of those loans were objective matters to be taken into account in determining the dominant purpose of the arrangement" (FC[356]), the loss incurred by GSM and Tironui on their respective loans to Plantic was not objectively reflective of, nor justified by, Plantic's financial position: FC[357].

78. Thus, the majority held that the primary judge had not erred in concluding that the "form of the transaction in relation to the debt forgiveness was predominantly explicable by the tax advantages expected to be conferred on the Merchant Group and in particular by the expectation that it would avoid tax otherwise becoming payable on a distribution of the profits of GSM and Tironui without a substantial tax liability being incurred by the trustee or beneficiaries of the MFT", which in turn ensured that Mr Merchant avoided tax on those profits as shareholder: FC[345], [357].

79. Finally, the existence of a dominant purpose of obtaining a tax benefit is not inconsistent with the loan forgiveness schemes facilitating the sale of Plantic for the highest ultimate return: *Spotless* at 414, 423.

80. ***Fourth***, the Merchant Parties contend at MPS[72], by reference to just two emails, that the evidence failed to support the conclusion that the predominant purpose of the Debt

Forgiveness Schemes was tax avoidance. They do so by asserting that those emails show that Mr Merchant was willing to contemplate a structure where he paid more tax if the price was higher. That submission—which is limited to one aspect of the objective circumstances—falls far short of establishing that the evidence, objectively considered, did not support a conclusion of dominant purpose.

81. Moreover, the assertion that the emails demonstrate a different predominant purpose is wrong. Mr Merchant wished to sell the Plantic shares. He proposed a form of transaction that involved a share sale and a debt forgiveness structure that provided him with a tax benefit. The assertion that, had a higher price been able to be obtained, he might have considered forgoing the tax benefit does not suggest that the dominant purpose of the Debt Forgiveness Schemes was to maximise the sale price of Plantic. As the majority in the Full Court explained at FC[354], the evidence was that Mr Merchant was not willing to sell the Plantic shares without a debt forgiveness unless he was compensated for the loss of tax benefit that was expected to have been enjoyed. This is consistent with the conclusion that the dominant purpose was to obtain a tax benefit.

82. Accordingly, while the Commissioner does not oppose the grant of special leave in respect of the cross-appeal, both it and the notice of contention should be dismissed.

Part VII: Time Required for Presentation of Argument

83. The Respondent's estimates for both this appeal and his appeal in S157/2025 remains as set out in his submission in S157/2025 filed 27 November 2025.

Dated: 20 January 2026

K Deards.

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K Deards with D Ananian-Cooper and N Derrington

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ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	*Income Tax Assessment Act 1936* (Cth)	As at 18 July 2014 (Including amendments up to Act No. 82, 2014)	Part IVA	Act in force on the date the BBG Share Sale Scheme was executed	2 September 2014
2.	*Income Tax Assessment Act 1997* (Cth)	Compilation dated 1 September 2014 (Including amendments up to Act No. 83, 2014)	ss 104-10, 104-15	Act in force on the date the BBG Share Sale Scheme was executed	2 September 2014
3.	*Superannuation Industry (Supervision) Act 1993* (Cth)	Compilation dated 1 July 2014 (Including amendments up to Act No. 62, 2014)	Part 3, Part 7	Act in force on the date the BBG Share Sale Scheme was executed leading to contraventions of the requirements of this Act.	2 September 2014