



## HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

**Appeal S158/2025**

**Gordon Stanley Merchant**  
First Appellant

**GSM Pty Ltd ACN 074 508 124**  
Second Appellant

and

**Commissioner of Taxation**  
Respondent

BETWEEN:

**Appeal S157/2025**

**Commissioner of Taxation**  
Appellant

and

**Gordon Stanley Merchant**  
First Respondent

**GSM Pty Ltd ACN 074 508 124**  
Second Respondent

**APPELLANTS' REPLY IN APPEAL S158/2025**

**CROSS APPELLANTS' REPLY ON THE CROSS-APPEAL AND RESPONDENTS'  
AMENDED 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: ARGUMENT****A. Submissions on the S158/2025 appeal (concerned with s 177D)****A.1 *Where does s 177C fit into this appeal?***

2. The Commissioner's submissions (CRS) at [17]-[20], [38]-[42] and [62](a) put various submissions about the role of s 177C in this appeal including suggesting at CRS [20] that it somehow "exposes the fundamental problem in the Merchant Parties' submissions".
- 10 3. The correct position is that there is no issue between the parties about the application of s 177C to the present case. The Merchant Parties accept:
  - (a) Section 177C applies to identify a tax benefit, in terms of the capital loss incurred on the sale of the BBG shares, which would not have been incurred in the year of income but for the scheme;
  - (b) Section 177C so applies, using the so-called "annihilation approach", under which the alternative postulate is the taxpayer "did nothing" – if the BBG shares had not been sold, the capital loss would not have been incurred;
  - (c) The alternative postulate which underpins the identification of the tax benefit for s 177C purposes is available as one alternative possibility to be brought to account at the subsequent s 177D stage in assessing the 8 statutory factors to determine whether objectively a purpose of obtaining a tax benefit predominated over other non-tax purposes. However, the s 177C alternative postulate does not necessarily exhaust the alternative possibilities to be considered at the s 177C stage: CRS [39].
- 20 4. The Merchant Parties do not use the terms "counterfactual" and "alternative postulate" to refer to the inquiry about whether there is a tax benefit (cf CRS [42]). Rather, they are used as synonyms for what Gummow and Hayne JJ in *Hart* referred to as the "other possibilities", by reference to which the 8 statutory factors in s 177D(2) must be assessed when determining dominant purpose.<sup>1</sup>

**A.2 *The Commissioner's concession and what follows from it***


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<sup>1</sup> *Hart* (2004) 217 CLR 216 at 243 [66].

5. At CRS [4] and [47], the Commissioner seeks to walk back the very clear concession made to the Full Court and the consequences it has for the s 177D enquiry. The terms of the concession are accurately recorded at FCJ [232] (emphasis added):

The Commissioner accepted that a sale of shares to a third party to realise a capital loss to offset a likely corresponding capital gain does not attract Part IVA.

6. The Commissioner's gloss on its concession at CRS [4] is as follows (emphasis added):

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.

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7. As seen from the emphasised material, the Commissioner seeks to walk back his concession both by adding qualifications not previously stated (“in the ordinary course and without additional facts”) and by omitting a key part of the concession (the subject of the concession is not just a sale “such that the taxpayer made a capital loss”; it is a sale “to realise a capital loss to offset a likely corresponding capital gain”).

8. The Full Court accurately recorded the concession.<sup>2</sup> While this Court will decide this appeal on the correct construction and application of the statute rather than simply on concession, an accurate grasp of the concession, and its consequences, is important for assessing whether the reasoning of the Full Court bespeaks error.

- 20 9. The Full Court made clear at FCJ [232] that its reasoning accepted the correctness of the concession. That meant that in the “routine” transaction covered by the concession a proper application of the 8 factors in s 177D leads to the result that the s 177D does not apply. The Merchant Parties have sought to explain why that must be so in chief at MPS [38]. The Commissioner has not really grappled with this analysis: cf CRS [47].

10. That application of the 8 factors to the “routine transaction” becomes important once it is appreciated that one of the alternative possibilities in play under s 177D was just that “routine transaction” – a sale of the BBG shares on market at arm's length to a third party.

**A.3 *Identifying the range of alternative possibilities for the s 177D exercise***

- 30 11. Thus far, these responsive submissions have identified two alternative possibilities

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<sup>2</sup> Full Court transcript day 2, page 97, lines 29-45.

which were relevant at the s 177D stage of enquiry: “do nothing” (see [3](b) above) or “sale on market at arm’s length to a third party” (see [10] above).

12. What is difficult to grasp clearly from the way the Commissioner’s submissions are structured is: what is the range of alternative possibilities that the Commissioner accepts were in the ring for the s 177D exercise? The Commissioner’s submissions are structured to assert he has findings which criticise or neutralise the various range of non-tax consequences and purposes relied upon by the Merchant Parties on a one-by-one basis, asserting each could have been achieved, if they were significant, by different alternative transactions. What the Commissioner does not do is identify the full range of alternative possibilities and then apply the 8 factors to each of the alternatives to reach the required overall conclusion whether there was a dominant tax purpose.

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13. As the argument unfolded in the Full Court, the parties identified up to five possible alternative transactions, albeit the third to fifth were variations on the second. They were: (1) As per the concession – Sale on market at arm’s length to a third party (**sale on market**); (2) As per the s 177C alternative postulate, the annihilation assumption (**do nothing**); (3) Make a lump sum cash withdrawal from GMSF to Mr Merchant (**GMSF cash withdrawal**); (4) MFT draws on debt (**MFT draw on debt**); (5) MFT sells other assets (**MFT sell assets**). It is with a steady eye to each alternative in turn, and to the 8 s 177D factors, that the Commissioner’s submissions should be assessed.

20 **A.4 *A proper analysis of the 8 s 177D factors in the light of the 5 possibilities***

A.4.1 *Possibility 1 – sale on market*

14. A number of the Commissioner’s submissions refer to the alternative of a sale on market (at arm’s length to a third party): see CRS [24], [49], [57]-[58].

15. The correct approach to the sale on market alternative is the following:

(a) Under factor (d), each of the schemes as pursued, and the alternative of a sale on market, would have achieved the same result under the Act, but for Part IVA: a capital loss would have been incurred. In this sense, if the sale on market alternative is contemplated, it speaks against the actual scheme having a tax purpose (let alone a dominant tax purpose) – the alternative puts the taxpayers in no better position taxwise than the actual scheme.

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(b) Assuming the sale on market occurred when a sale of Plantic and the associated capital gain was anticipated, then the manner and timing of the sale would be no

more indicative of a dominant tax purpose than the actual scheme (factors (a) and (c)). See also MPS [38] and [51] regarding the timing of the actual scheme.

- (c) MFT would have received \$5.8m in cash (factors (e) to (g)), just as it did in the actual scheme.
- (d) Ownership of the BBG shares would pass from MFT to an unrelated third party (factors (e) to (h)). Thus a sale on market would not have achieved a critical purpose of Mr Merchant, which the Full Court found and all parties accept, namely that he retain effective control of the BBG shares, even if now in a different entity (GMSF) and subject to different legal, tax and financial considerations.
- 10 (e) Related to the above point, the sale on market alternative would have deprived GMSF of exposure to the BBG shares; whereas the scheme achieved such exposure (factors (e) to (g)).
- (f) Also related to the above point, the sale on market alternative would not have required GMSF to cease paying Mr Merchant a pension and return from pension phase to the accumulation phase, whereas the actual scheme did have those consequences.
- (g) There would be no difference between the form and substance of a market sale (factor (b)). It would in form and substance be a sale of identified property in  
20 exchange for cash reflecting its market value, which in the circumstances results in a capital loss for the seller.
16. Some further specific points should be made about a number of the subparagraphs above.
17. **MFT's receipt of cash:** MFT receives cash in both the actual scheme and the sale on market alternative. It is important that, by his concession, the Commissioner accepts that it does not matter whether MFT "needed" that cash in order to conclude that the dominant purpose of such a scheme is not tax avoidance. That is the correct approach; yet the Commissioner takes an inconsistent position on this issue in respect of the actual scheme, arguing that the receipt of cash ought to be excluded from the 177D(2) analysis  
30 for the actual scheme because MFT had no "objective need" for cash: CRS [9], [14], [59], [62].
18. **Control:** The Commissioner's submissions seek to make various points about the significance of loss of control under the sale on market alternative, points which are not

always consistent. The Commissioner begins CRS [9] by asserting the majority in the Full Court and the primary judge found that “none of the identified purposes was a genuine commercial purpose of the BBG Share Sale”, and in developing that point states that “the sale did not need to occur to permit Mr Merchant to control the BBG Shares”. However, elsewhere the Commissioner submits that retaining ownership and control of the BBG shares “is a matter relevant to a number of the s 177D(2) factors”: CRS [41]. Similarly, the Commissioner relies on Mr Merchant’s objective of maintaining control to assert that the potential for appreciation in the value of the BBG shares was of no benefit to GMSF because they would never be sold: CRS [31]-[32], [49]. The true position is that maintaining control of the BBG shares was a genuine commercial purpose, and that the actual scheme facilitated the achievement of that purpose whereas the sale on market alternative would not have. That indicates that a critical purpose of pursuing the actual scheme instead of the on market sale was to retain such control and that the dominant purpose of the actual scheme was not to obtain a tax benefit.

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19. **GMSF’s receipt of the BBG shares:** The Commissioner argues that this feature of the scheme is of no objective significance because BBG was unlikely to pay dividends and because any “appreciation in value would not be crystallised by Mr Merchant ever selling”: CRS [31]-[32]. While BBG was unlikely to pay dividends, there was no finding below that Mr Merchant would never sell BBG shares. The finding was that the shares would not be sold “at least in the short to medium term”: PJ [398]. A finding that he would never sell BBG shares would have been at odds with the evidence below, which demonstrated that Mr Merchant and his advisors contemplated, unsurprisingly, that Mr Merchant would or might sell his shares in BBG “if the BBG share price increases over the next couple of years” (see the emails extracted at PJ [62], [118], [123]).
20. The Merchant Parties do not need to prove that it was likely that the shares would increase in value in order for GMSF owning the shares to be a consequence that is material to the assessment of dominant purpose: cf CRS [33]; MPS [27]-[29]. Again the Commissioner’s concession about the on market sale is instructive – the seller in that alternative does not need to prove that it is likely to receive a better return from cash than the shares it sold in order to justify a conclusion that Part IVA does not apply to that sale.
21. The Commissioner submits that another disadvantage of GMSF acquiring the BBG shares is that it resulted in GMSF contravening provisions of the SIS Act: CRS [9],

[13](a), [24], [25]. A conclusion that those provisions were contravened is substantially dependent on a conclusion that the acquisition was done for the purpose of enabling MFT to obtain the tax benefit of a capital loss.<sup>3</sup> It is thus circular for the Commissioner to rely on such contraventions when the issue is whether such a conclusion about purpose ought to be reached. Further, a contravention of the SIS Act does not prevent the objective consequences relied upon by the Merchant Parties from tending against a dominant purpose conclusion.

22. **GMSF ceasing to pay a pension:** The Commissioner says that GMSF ceasing to pay a pension and moving to accumulation phase under the actual scheme but not the sale on market alternative are “disadvantages” of the actual scheme suggesting that the dominant purpose was to obtain a tax benefit: CRS [9], [13](b), [25], [29]. Properly viewed, they are simply the opportunity cost of acquiring the BBG shares. They are relevant but ultimately neutral on the question of purpose: MPS [27].
23. **Form and substance:** The Commissioner argues that a comparison of the form and substance of a market sale reveals a material difference with the actual scheme, because the actual scheme results in Mr Merchant “retaining his economic interest”: CRS [57]. That is a difference between the scheme and the alternative, but it does not mean that there was a difference between the form and substance of the actual scheme. As Logan J found at FCJ [41], there is no disparity between the form and substance of the scheme. All of the features of what the Commissioner calls the substance of the scheme (“that Mr Merchant crystallised a capital loss while retaining his economic interest”) are ones that derive from the form of the scheme – being the sale of an identified number of BBG shares from MFT to GMSF for their market price. As developed at length in relation to ground 1(a) (MPS [19]-[30]) while the transfer of ownership of the BBG shares from MFT to GMSF permitted Mr Merchant to retain control, it is impossible to ignore that MFT and GMSF are different entities and subject to different legal, tax and financial considerations. It cannot be said that the difference between them is merely one of form and not also one of substance.
24. **Conclusion:** Consideration of the 8 factors demonstrates that the sale on market alternative would have achieved the same tax benefit while at the same time not achieving other non-tax consequences for those who carried it out. Properly analysed,

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<sup>3</sup> See *Merchant v Commissioner of Taxation* [2024] AATA 1102 at [129], [150], [159].

the fact that the “routine” alternative had the exact same tax benefit as the actual scheme, and was readily available but not in fact pursued, is significant because it shows that obtaining a tax benefit was not the dominant purpose. The majority was thus wrong to say that “[t]he exemplified routine transaction distracts attention from what objectively occurred in this case” (FCJ [233]; see also CRS [56] and cf MPS [44]). Properly understood, the routine transaction example was significant in the dominant purpose analysis.

#### A.4.2 Possibility 2 – do nothing

25. In various places, the Commissioner invokes the possibility of doing nothing (the alternative postulate derived from the s 177C enquiry) as revealing the dominant tax purpose of those carrying out the scheme: CRS [62](a) and see also [9], [13], [54].
26. Of the do nothing alternative, as with the balance of the alternatives to be considered, it might be said in the Commissioner’s favour that under factor (d) the result in relation to the operation of the Act (but for Part IVA) that would be achieved by the scheme differed from the result under the alternative: the scheme produced the tax benefit in the form of the capital loss; whereas if nothing was done, no capital loss would be incurred.
27. But that is where the consideration of the 8 factors in the Commissioner’s favour starts and ends. The do nothing alternative reveals little about the application of factors (a), (b) or (c) or (h). But what it reveals about factors (e)-(g) favours the taxpayers.
- 20 (a) A do nothing alternative leaves the taxpayers in the same financial position and with the same consequences for *some* aspects of the transaction – such as Mr Merchant retaining effective control of the BBG shares, GMSF maintaining its total assets and MFT retaining its other assets and not having to increase its debt.
- (b) The do nothing alternative also results in what the Commissioner contends is a benefit – GMSF retaining cash to pay Mr Merchant’s pension.
- (c) However, the do nothing alternative fails to achieve two consequences of the scheme falling within factors (e)-(g): MFT does not receive \$5.8m in cash; and GMSF does not acquire exposure to the BBG shares.
28. The overall conclusion from consideration of the second alternative, when applying the 8 factors, is the do nothing alternative would have denied the taxpayers the tax benefit but at the cost of not achieving other non-tax consequences for the taxpayers.
- 30 29. Because both the tax consequences and the non-tax consequences are different from the

actual scheme, the alternative does not support a finding that the dominant purpose of those carrying out the scheme was to obtain a tax benefit. At best, the comparison indicates that it was the combination of these differences which explains the purpose of those who decided to pursue the actual scheme instead of this alternative. That being so, it indicates that obtaining the tax consequence was not the dominant purpose.

30. Further, as addressed in the context of Ground 1(b) (MPS [50]-[51]) the differences mean that the alternative cannot properly be used to discount the significance for the purpose analysis of such of the consequences of the actual scheme as it would have achieved. That is, the differences mean that the do nothing alternative is an inadequate basis to conclude that retaining effective control of the BBG shares was not a “genuine”, “substantial” or “real” consequence and thus informative of an objective conclusion about the dominant purpose of those carrying out the scheme.
31. None of this is to say that the Court is precluded from looking at alternative possibilities which do not achieve precisely the same non-tax consequences of the actual scheme: see MPS [33] and cf CRS [39]-[41]. The point is that the non-tax differences between a given alternative that would not produce a tax benefit, and the actual scheme which does produce a tax benefit, can (and here do) result in the alternative suggesting that any purpose of obtaining a tax benefit was not dominant.

#### A.4.3 Possibility 3 – GMSF cash withdrawal

32. The analysis of the 8 statutory factors for the GMSF cash withdrawal alternative is similar to that for the do nothing alternative. No capital loss would have been incurred. The alternative reveals little about the application of factors (a), (b) or (c) or (h); but is revelatory about factors (e)-(g).
- (a) Again, a GMSF cash withdrawal alternative leaves the taxpayers in the same financial position and with the same consequences for *some* aspects of the transaction – such as Mr Merchant retaining effective control of the BBG shares and MFT retaining its other assets without increasing its debt. Mr Merchant could gift the cash to MFT so that it effectively has access to the same cash it would have received for selling the BBG shares. GMSF would (as in the actual scheme) have to cease to pay Mr Merchant’s pension and move from the pension phase to the accumulation phase.
- (b) However, there are again *important differences* between the GMSF cash

withdrawal alternative and the actual scheme: GMSF does not acquire exposure to the BBG shares and the total assets in the favourable tax environment of GMSF are reduced.

33. As to the second of those differences, the Commissioner's submissions state that the sale "diminished the assets of the GMSF by swapping an income producing asset (cash) with a non-income producing asset (the BBG Shares)": CRS [62](d). The sale did not "diminish" GMSF's assets. The shares were bought at market value and so GMSF's total assets before and after the sale were the same. In describing the shares as a "non-income producing asset", the Commissioner again ignores the potential for the shares to appreciate in value, which is flawed for the reasons given at [19]-[20] above.
34. Like the do nothing alternative, the GMSF cash withdrawal alternative would have denied the taxpayers the tax benefit but at the cost of not achieving other non-tax consequences for the taxpayers. The points made at [29]-[30] above apply equally to this alternative. It does not suggest a dominant purpose of obtaining a tax benefit.

#### A.4.4 Possibility 4 – MFT draw on debt

35. The analysis of the 8 statutory factors for the MFT draw on debt alternative is again similar to that for the do nothing alternative. No capital loss would have been incurred. The alternative reveals little about the application of factors (a), (b) or (c) or (h); but is revelatory about factors (e)-(g).
- (a) Again, the alternative leaves the taxpayers in the same financial position and with the same consequences for *some* aspects of the transaction – such as Mr Merchant retaining effective control of the BBG shares and MFT retaining its other assets. MFT would receive access to the same amount of cash as it did in the sale. GMSF could continue to pay Mr Merchant's pension.
- (b) However, there are again *important differences* between the alternative and the actual scheme: GMSF does not acquire exposure to the BBG shares and MFT's debt is increased, contrary to what the primary judge found to be Mr Merchant's aversion to debt: see MPS [54].
36. The MFT draw on debt alternative would have denied the taxpayers the tax benefit but at the cost of not achieving other non-tax consequences for the taxpayers. The points made at [29]-[30] above apply equally to this alternative. It does not suggest a dominant purpose of obtaining a tax benefit.

#### A.4.5 Possibility 5 – MFT sell assets

37. The analysis of the 8 statutory factors for the MFT sell assets alternative is again similar to that for the do nothing alternative.
- (a) As for factor (d), the result under the Act, but for Part IVA, of a sale of different assets would depend on what assets were sold and for what price. This is not explored in any detail in the judgments below. It might have resulted in capital losses or capital gains.
  - (b) The alternative reveals little about the application of factors (a), (b) or (c) or (h); but is revelatory about factors (e)-(g).
  - 10 (c) The alternative leaves the taxpayers in the same financial position and with the same consequences for *some* aspects of the transaction – such as Mr Merchant retaining effective control of the BBG shares and MFT does not increase its debt. The sale of other assets would result in MFT receiving the same cash it received for the BBG shares. GMSF could continue to pay Mr Merchant’s pension.
  - (d) However, there are again *important differences* between the alternative and the actual scheme: GMSF does not acquire exposure to the BBG shares and MFT loses ownership of the other assets that have to be sold.
38. The MFT sell assets alternative might have denied the taxpayers the tax benefit (and might indeed have had a greater tax cost if capital gains were made), but again at the  
20 cost of not achieving other non-tax consequences for the taxpayers. The points made at [29]-[30] above apply equally to this alternative. It does not suggest a dominant purpose of obtaining a tax benefit.

#### A.4.6 Graphic depiction of the above submissions

39. The submissions made in this **Section A.4** can be graphically depicted (see the chart over the page). Highlighted cells show differences between the alternative and actual scheme.
40. The point of this chart is not to suggest that the s 177D 8 factor analysis can be reduced to a “*tick-a-box*” exercise. Clearly evaluative judgments are involved, based upon the primary facts as proved. But it is to demonstrate further the force of the Merchant  
30 Parties’ submissions made below and here, and not squarely addressed on their merits by the Full Court or the Commissioner, that may be brought together as follows.
41. As Logan J found in dissent, the BBG share sale achieved multiple other consequences

apart from crystallising a capital loss: FCJ [42].<sup>4</sup> There was no “other possibility” that achieved all of the non-tax consequences, and there was a readily available “other possibility” (i.e. an on-market sale) that would have achieved exactly the same tax consequence but not all of the non-tax consequences. In those circumstances, the fact that the BBG share sale was carried out instead of the alternative leads inexorably, as Logan J held, to the conclusion that obtaining a tax benefit was not the dominant purpose of those carrying out the BBG share sale (contra CRS [24] and [41]).

	Actual transaction	Sale on market	Do nothing	GMSF cash withdrawal	MFT draw on debt	MFT sell other assets
Capital loss	Yes	Yes	No	No	No	Depends
Control maintained	Yes	No	Yes	Yes	Yes	Yes
MFT gets cash	Yes	Yes	No	Yes	Yes	Yes
Super Fund gets BBG exposure	Yes	No	No	No	No	No
Super Fund can pay pension	No	Yes	Yes	No	Yes	Yes
Total assets in Super Fund maintained	Yes	Yes	Yes	No	Yes	Yes
No additional debt	Yes	Yes	Yes	Yes	No	Yes
Other assets of MFT maintained	Yes	Yes	Yes	Yes	Yes	No

10 42. In sum, had the required analysis of the 8 factors been undertaken, with a proper regard to each of the alternatives raised by the parties, it would have demonstrated that:

- (a) It could not be concluded that the participant’s tax purpose explained the transaction, because the same tax consequences would have attended a sale of the BBG shares to a third party (MPS [41]), being the “routine” manner of conducting the same transaction, which would not have attracted the operation of Part IVA

<sup>4</sup> Cf CRS [64], which understates the difference between Logan J and the majority as relevantly being that Logan J placed “weight on the fact that a sale to a third party would not have achieved the maintenance of control”.

(MPS [37]-[38]); and

- (b) Any tax benefit purpose did not predominate over the purpose of achieving the objectively beneficial non-tax consequences of the BBG share sale scheme (MPS [21]-[30], [49]-[59]), particularly in light of the fact that none of the other 4 possible variations of the scheme would have achieved all the same consequences: MPS [42], [45].

**A.5 *The “wash sale” analogy is a poor one***

43. While buried deeply in the Commissioner’s submissions (see CRS [58]), he does maintain that the Full Court was right at FCJ [234] to regard this case as basically the same as a “wash sale” for the purposes of s 177D. However, the Commissioner does little to justify that leap in the majority’s reasoning. This lies at the heart of the disposition of this appeal. It was only because the Full Court made the errors articulated in Grounds 1(a) and (b) of the Notice of Appeal, that it made the leap of equating the present case with a wash sale.

44. In a wash sale:

(a) The scheme would be defined not as a single sale transaction, but two: a sale of shares followed soon thereafter by a re-acquisition of the same shares.

(b) The result in relation to the operation of the Act, but for Part IVA, is that the seller crystallises a capital loss and sets a new cost base for the shares (factor (d)).

20 (c) The scheme is carried out over a short period of time (factor (c)), and it is only during that short period of time that the seller retains the initial sale proceeds and is deprived of exposure to the shares.

(d) The change in financial position of the seller (factor (e)) resulting from the scheme is minimal. They have substantially the same share exposure before and after the scheme. The only difference might arise from movements in the share price between the two transactions (which is kept to a minimum by the short time over which the scheme is implemented) and transaction costs.

(e) The above suggests a difference between the form and substance of the scheme (factor (b)). In form, the scheme involves two transactions; but in substance the seller’s position is the same as if neither transaction had ever occurred, aside from

30 the tax benefit.

45. The critical difference between the BBG share sale and a wash sale is that a wash sale

involves the same person owning the shares before and after the scheme. The cash they receive on the initial sale does not suggest a non-tax purpose because they immediately have to spend it to get the shares back. The loss of shares on the initial sale does not suggest a non-tax purpose because they get them back immediately. The substance of the scheme is substantially different from its form. By likening the BBG share sale to a wash sale, the Commissioner (and the majority in the Full Court) treat MFT and GMSF as though they are in substance the same person.

- 10 46. While it is true that the majority in the Full Court “acknowledged that there were differences between the superannuation environment and other trusts” (CRS [25]), that acknowledgment was limited to accepting that a superannuation fund could be an advantageous environment in which to hold shares and a restrictive environment in which to hold cash when compared with a discretionary trust: see FCJ [266], [272]. The majority did not consider any of the other consequences set out in MPS [21]-[24] (which are accepted by the Commissioner at CRS [23]). In concluding at FCJ [232] that the sale of the BBG shares “had no other practical, commercial or economic consequence for Mr Merchant as the ultimate controller” beyond realising a capital loss, the majority erroneously treated GMSF and MFT as though there is no material difference between them.

**A.6 *False dichotomy between commercial basis and tax avoidance***

- 20 47. The Merchant Parties do not say that “showing that even a single rational commercial outcome was achieved by the scheme is sufficient to take the transaction outside Part IVA” and nor do they “perpetuate the false dichotomy” between a scheme having a rational commercial basis and the dominant purpose of tax avoidance: CRS [44]; see also [20], [35]-[36], [43]-[45]. The review of the other possibilities does not merely show that the scheme achieved a “rational commercial outcome”; it shows multiple rational commercial outcomes and, more importantly, that there was no other way to achieve them all.
- 30 48. Nor do the Merchant Parties need to establish that the only schemes to which s 177D applies are those that make “no sense” or have “no explanation” without the tax benefit: cf CRS [43] and [45]. The point of the reference to that language in MPS [59] was to say that the fact that this scheme cannot be said to be such a scheme tends against a dominant tax purpose conclusion. That said, the passages in *Hart* cited by the

Commissioner at CRS [43] do not establish that s 177D would apply more broadly than schemes that meet that description. So long as the references to schemes making “no sense” and having “no explanation” without the tax benefit are understood as referring not merely to the scheme as a whole but also to each and every part of it, then indeed it is difficult to see how Part IVA could apply more broadly. That is simply a consequence of (1) the test being objective and (2) the need for the tax avoidance purpose to be dominant over all other purposes in order for Part IVA to apply.

**B. Submissions on the S157/2025 cross-appeal and notice of contention (s 177E)**

**B.1 *The relevance of the BBG share sale scheme to the Debt Forgiveness Schemes***

- 10 49. The Commissioner maintains that he can lose the dominant purpose enquiry under s 177D in respect of the BBG share sale scheme, and still win on the dominant purpose enquiry under s 177E in respect of the Debt Forgiveness Schemes: CRS [68]-[70]. He says that it is enough that MFT had the BBG share sale capital loss – even if the BBG share sale was not done for the dominant purpose of obtaining that loss: CRS [69]. Thus, the Commissioner says that the Debt Forgiveness Schemes are dividend stripping even if the BBG capital loss had no more significance for the purpose analysis than all of MFT’s other capital losses from entirely unrelated past investments, because they are all “surrounding circumstances” to be considered in the analysis: CRS [70].
- 20 50. The schemes identified by the Commissioner did not treat the BBG capital loss as being the same as all of MFT’s other capital losses. They included the making of the BBG capital loss as a component of the scheme, and did not refer at all to the existence of MFT’s non-BBG capital losses: see FCJ [306]. That is why a conclusion that the BBG share sale was not done for the dominant purpose of obtaining the associated capital loss would fundamentally undermine the adverse dominant purpose conclusion reached by the majority in respect of the Debt Forgiveness Schemes.
- 30 51. If the Commissioner’s position in this Court were correct, it would mean that any time an entity forgives loans owing by related-party companies as a condition of a share sale (thereby increasing the capital proceeds received for the shares, and reducing the property available to the related-party companies to pay out as dividends) there is a dividend stripping scheme if the seller company happens to have past or current year capital losses. That would substantially extend the operation of dividend stripping schemes, far beyond the kinds of convoluted and artificial schemes seen in the decided

cases, to an entirely ordinary form of commercial transaction.

**B.2 *The relevance of counterfactuals for deciding dominant purpose under s 177E***

52. At CRS [71]-[72], the Commissioner again suggests a “fundamental error” in the Merchant Parties’ cross-appeal and notice of contention, on the basis of what is ultimately a false issue about tax benefit. The parties are agreed that:

- (a) A tax benefit in the context of s 177E is identified in the way set out in s 177E(1)(c).
- (b) Consideration of “other possibilities” is a useful analytical tool for assessing purpose in the context of s 177E for the same reasons that it is a useful tool for assessing purpose in the context of s 177D: CRS [72].
- (c) The relevant “other possibilities” in assessing purpose for s 177E are not limited to the counterfactual involved in identifying tax benefit under s 177E(1)(c): CRS [72].

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**B.3 *The correct counterfactual analysis***

53. At CRS [81] the Commissioner argues that the evidence relied upon by the Merchant Parties shows 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”. Even that formulation shows that obtaining the relevant kind of tax benefit was not the dominant purpose. As the majority emphasised, the relevant dominant purpose for s 177E is not one of avoiding tax generally; it is one of avoiding tax on dividends: FCJ [341]. Selling the shares without a debt forgiveness would not avoid tax on dividends. It cannot be said that avoiding tax on dividends was the dominant purpose when Mr Merchant was open to forms of transaction that did not involve a debt forgiveness.

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