HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, HEYDON, KIEFEL AND BELL JJ

COMMISSIONER OF TAXATION APPELLANT

AND

QANTAS AIRWAYS LIMITED RESPONDENT

Commissioner of Taxation v Qantas Airways Limited
[2012] HCA 41
2 October 2012
S47/2012

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court made on 1 September 2011 and in place thereof order that the appeal to the Full Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

A H Slater QC with J O Hmelnitsky and C A Burnett for the appellant (instructed by Australian Government Solicitor)

R C Cordara SC with C M Sievers for the respondent (instructed by PricewaterhouseCoopers)

CATCHWORDS

Commissioner of Taxation v Qantas Airways Limited

Goods and Services Tax – Taxable supply – Supply – Consideration – Overbooking – Attribution of tax period – Airfares that were non-refundable or refundable but unclaimed – Customer cancels or fails to take purchased flight – Promise by airline to use best endeavours to carry passengers and baggage – Whether a taxable supply under *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), s 9-5 – Whether airline liable to remit to Commissioner GST on non-refundable or unclaimed refundable fares.

Words and phrases – "a supply for consideration", "consideration", "taxable supply".

A New Tax System (Goods and Services Tax) Act 1999 (Cth), ss 7-1, 9-5, 9-10, 9-15, 29-5(1).

GUMMOW, HAYNE, KIEFEL AND BELL JJ.

Introduction

1 The respondent ("Qantas") and its subsidiaries, including Jetstar Airways Pty Limited ("Jetstar"), provide domestic and international air travel but this litigation concerns only their domestic operations. Both Qantas and Jetstar supply classes of air travel with varying fare rules and conditions of carriage. They engage in "overbooking", a practice of booking more passengers on a flight than there are seats available, in anticipation that not all of those booked will present themselves to board the flight. This is said by Qantas to be a practice common among airlines, and is a practice of long standing by Qantas.

2 At all relevant times Qantas acted under subdiv 48-A of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act"), as the representative member of the corporate group. Each month was a tax period and on that monthly basis Qantas remitted GST as the representative member.

3 The amount in contest in this appeal is the GST on fares received from prospective passengers who failed to take the flights for which reservations and payment had been made. In accordance with the applicable conditions, some fares were forfeited while others were refundable on application within a stipulated period but no refund claim was made. Division 19 of the GST Act makes special provision for "adjustment events" such as a change in the consideration for a supply by reason of a refund of the fare, leading to a decreasing adjustment to the GST. But this dispute is concerned not with refunds but with cases where no refund was claimed or none was available. Qantas did not contend that Div 19 had any direct application.

4 Section 29-5(1) is an important provision in the legislative scheme. The GST is attributable to the tax period in which there is received "any" of the consideration, being the fares paid, or, before that receipt, the invoice is issued.

5 The appellant ("the Commissioner") stresses that the effect of the GST Act is that with respect to any particular transaction the GST is payable only once, at the end of the attributable taxation period. In particular, GST is not payable more than once by reason that the consideration is received in connection with an executory contract which involves more than one supply. Thus, GST on the consideration received is not payable in each of the tax periods in which a series of events occur in performance of an executory contract; the GST is payable once, in the tax period of the first payment or invoice.

6 The fares were calculated to recover from the customer the GST payable on the amount of those fares. On payment of the fare the GST amount was recorded by the airline as a debt due to the Commissioner; the balance was credited to unearned income until the flight was taken or the fare was forfeited. The GST component of the fares for flights not taken was not refunded to customers. The assessments in evidence total $34,275,917; this comprises $26,604,347 in GST in respect of forfeited fares (divided between Qantas as to $16,717,019 and Jetstar $9,887,328) and $7,671,570 in GST in respect of fares where a refund was permitted but no claim to the refund had been made.

The litigation

7 Qantas contended that GST was not payable on the unused fares and that the GST which had been paid on them should be refunded by the Commissioner. To resolve the dispute the Commissioner issued assessments for the monthly tax periods from July 2005 to June 2008, including GST on fares received by Qantas in those months in respect of travel not undertaken. By Notice of Objection dated 31 July 2009, Qantas objected to the inclusion of the GST on unused fares. On 9 October 2009 the Commissioner disallowed the objection pursuant to s 14ZY of the *Taxation Administration Act* 1953 (Cth) ("the Administration Act"). The objection decision was referred to the Administrative Appeals Tribunal ("the AAT") (comprising the President, Downes J, and Senior Member Mr S E Frost), for review under s 14ZZ of the Administration Act.

8 The AAT delivered its reasons on 6 December 2010[1] and affirmed the disallowance by the Commissioner of the objection by Qantas.

9 Qantas then pursued the matter by an "appeal" under s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) to the Federal Court of Australia. The appeal was heard by a Full Court (Stone, Edmonds and Perram JJ). There was no issue that the appeal raised questions of law sufficient to attract jurisdiction under s 44[2]. On 1 September 2011 the Full Court set aside the decision of the AAT, together with the objection decision of the Commissioner, and allowed in full the Notice of Objection by Qantas.

10 By special leave the Commissioner appeals to this Court against the whole of the judgment of the Full Court. For the reasons which follow the appeal

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1 (2010) 119 ALD 199.

2 *Qantas Airways Ltd v Federal Commissioner of Taxation* (2011) 195 FCR 260 at 263.

should be allowed, the orders of the Full Court should be set aside and in place thereof the appeal to the Full Court should be dismissed.

The Full Court decision

11 Stone J agreed with the joint reasons of Edmonds and Perram JJ. Their Honours set out various provisions of the Qantas conditions of carriage as at September 2008 ("the Qantas conditions") and the Jetstar conditions of carriage as at February 2008 ("the Jetstar conditions"). They concluded that it was plain that "what each customer pays for" is carriage by air and continued[3]:

> "This is the essence, and sole purpose, of the transaction. The prospective supply is of air travel, dare we say, in the face of [*Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd*[4]], 'nothing more or less'. Having recognised the actual travel had not been supplied, and that was the purpose of the booking, that should have been the end of the inquiry. The actual travel was the relevant supply, and if it did not occur there was no taxable supply. Instead, what the Tribunal did was to look for other 'acts' satisfying the definition of supply. It erred in doing so, for even if the identified 'acts' were capable of meeting the definition of supply, they were not 'acts' for which the consideration was provided."

12 This reasoning fixes upon the consideration "for" which a "taxable supply" was provided and identifies this by distilling from the arrangements between airline and customer the "essence and sole purpose" of the transaction[5].

13 In this Court, Qantas relied upon this reasoning and claimed support for a "substantive approach" to the legislation by analogy to the decision in *Baltic Shipping Co v Dillon*[6]. That litigation concerned an unsuccessful claim by a

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3 (2011) 195 FCR 260 at 278.

4 (2008) 236 CLR 342 at 347-348 [13]; [2008] HCA 22.

5 cf the principle that an instrument be stamped "for its leading and principal object": *Limmer Asphalte Paving Co v Commissioners of Inland Revenue* (1872) LR 7 Ex 211 at 217; *Commissioner of Stamp Duties (NSW) v Pendal Nominees Pty Ltd* (1989) 167 CLR 1 at 10-11, 24, 33-34; [1989] HCA 19; *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576 at 582-583 [11]; [2010] HCA 49.

6 (1993) 176 CLR 344; [1993] HCA 4.

passenger for return of that part of the fare she had paid which had not been refunded. The claim was for a total failure of consideration by the shipping company[7] when the ship sank after the eighth day of what was to be a 14 day cruise. Deane and Dawson JJ[8] approached the issue of total failure of consideration by asking "as a matter of substance" what was the consideration promised by the shipping company. *Baltic Shipping* provides no analogy with situations in which the airline retains the fare in exercise of its entitlement to do so after the passenger does not board the flight; there has been no failure by the airline in its performance.

The legislation

14 The determination on this appeal of whether the process of abstraction by the Full Court is justified requires further attention to the operative provisions of the GST Act. The appeal turns upon the construction and application of those provisions. In particular, in the phrase "the supply *for* consideration" (emphasis added), which appears in the definition of "taxable supplies" in s 9-5(a) and is set out below, the word "for" is not used to adopt contractual principles. Rather, it requires a connection or relationship between the supply and the consideration.

15 Section 7-1 of the GST Act is identified as a "central provision". It relevantly states that GST is payable "on *taxable supplies". The use of the asterisk is a device to alert the reader to the presence of a definition in the Dictionary to the Act. Division 9 (ss 9-1 - 9-99) is headed "Taxable supplies". Section 9-5 answers a question "What are taxable supplies?" by stating that "you" make such a supply if:

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

16 It should be noted that s 9-5 goes on to state that the supply is not a "taxable supply" to the extent that it is "*GST-free" or "*input taxed". None of

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7 (1993) 176 CLR 344 at 348.

8 (1993) 176 CLR 344 at 378.

the supplies in connection with which the unused fares were received were GST-free or input taxed.

17 The term "consideration" is defined in s 9-15 so as to include "any payment, or any act or forbearance, in connection with a supply of anything" (s 9-15(1)(a)), and "any payment, or any act or forbearance, in response to or for the inducement of a supply of anything" (s 9-15(1)(b)).

18 Section 9-10 is headed "Meaning of supply". Sub-section (1) of s 9-10 states that a supply "is any form of supply whatsoever". Sub-section (2) should be set out in full:

> "Without limiting subsection (1), *supply* includes any of these:
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> (a) a supply of goods;
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> (b) *a supply of services*;
>
> (c) a provision of advice or information;
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> (d) a grant, assignment or surrender of *real property;
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> (e) *a creation*, grant, transfer, assignment or surrender of *any right*;
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> (f) a *financial supply;
>
> (g) *an entry into*, or release from, *an obligation*:
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> (i) *to do anything*; or
>
> (ii) to refrain from an act; or
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> (iii) to tolerate an act or situation;
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> (h) *any combination* of any 2 or more of the matters referred to in paragraphs (a) to (g)." (emphasis added)

The Commissioner relies upon the emphasised portions of pars (b), (e), (g) and (h).

19 With the distinction between "supply" and "taxable supply" in mind, the Court observed in *Reliance Carpet*[9]:

> "The composite expression 'a taxable supply' is of critical importance for the creation of liability to GST. In the facts and circumstances of a given case there may be disclosed consecutive acts each of which answers the statutory description of 'supply', but upon examination it may appear that there is no more than one 'taxable supply'."

That is not to deny that the one consideration may be received for more than one supply, although, as noted above[10], the GST will be payable once and will be attributable to the first tax period in which any of the consideration is received or invoiced.

20 The substance of the submission by Qantas, variously expressed, is that the Full Court was correct because (i) the dealings between Qantas and Jetstar and prospective passengers were such that there was no more than one projected "taxable supply", namely the supply of air travel, (ii) this supply did not come to pass and (iii) no GST was exigible.

21 In addition to the above general provisions of the statute, various specific provisions with respect to various species of supply are made elsewhere in the GST Act and use phrases of relationship and connection. The specific provisions of the GST Act with which this case was concerned were insufficiently appreciated in submissions by Qantas. It sought to derive from what was said in three cases support for the construction of the general provisions in Div 9 dealing with taxable supplies and consideration, in particular the phrase "the supply *for* consideration" in the definition of "taxable supply" in s 9-5(a).

22 *Travelex Ltd v Federal Commissioner of Taxation*[11] turned upon subdiv 38-E (headed "Exports and other supplies for consumption outside Australia") and in particular upon the phrase "in relation to rights" in Item 4 of the table appearing in s 38-190, which listed certain supplies which were GST-free; this Court held that the supply of foreign currency notes was sufficiently a supply "in relation to rights" to attract the exemption. *Saga*

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9 (2008) 236 CLR 342 at 346 [5].

10 At [5].

11 (2010) 241 CLR 510; [2010] HCA 33.

Holidays Ltd v Commissioner of Taxation[12], a decision of the Full Court of the Federal Court, turned upon the phrase "connected with Australia" in par (c) of s 9-5, and upon s 9-25(4), which stipulated that "[a] supply of *real property is *connected with Australia* if the real property, or the land to which the real property relates, is in Australia"; the decision of Gzell J in *TAB Ltd v Commissioner of Taxation*[13] hinged upon the phrase in Div 126 "relating to the outcome of a *gambling event" in the definition of the term "gambling supply" (s 126-35(1)(b)).

Reliance Carpet

23 The emphasis by the Full Court upon *Reliance Carpet*[14] was repeated by Qantas in submissions to this Court. That case was treated as if it supported the contention by Qantas that the sole candidate for a taxable supply was the flight, for which the fare was pre-paid, to the exclusion of supply by reason of the making of the contract of carriage upon payment of the fare.

24 The issue in *Reliance Carpet* was whether the GST was attracted in respect of the amount of a deposit forfeited by the vendor upon termination for default by the purchaser. Section 99-5 stated that the deposit was not to be treated as consideration for a supply but stipulated that the benefit of this provision was lost if the deposit was forfeited for failure to perform the obligation for the performance of which it was security. Section 99-10 provided that the GST which was payable on a taxable supply for which the consideration was a deposit was attributable to the tax period during which the deposit was forfeited.

25 In *Reliance Carpet* the Full Court of the Federal Court had accepted[15] the primary submission by the taxpayer that there had been no "taxable supply" because (i) the essential or principal supply was the single subject of the tax, (ii) in the instant case that single subject was a supply of real property and

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12 (2006) 156 FCR 256.

13 (2005) 223 ALR 309.

14 (2008) 236 CLR 342.

15 *Reliance Carpet Co Pty Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 433 at 438.

(iii) the contract had been terminated so that there had been no supply of real property and Div 99 had no work to do. The Full Court said[16]:

> "When the [taxpayer] entered into the contract for sale with the purchaser it entered into a contract for the supply of real property; nothing more and nothing less."

26 This Court reversed the decision of the Full Court. The Court said[17]:

> "the use of the phrase 'nothing more and nothing less' appears to give insufficient weight both to the definition of 'real property' in the Act, and to the identity of the subject matter of the contract, in accordance with ordinary principles of conveyancing, as the title or estate of the vendor in a parcel of land rather than merely the parcel itself in a geographical sense[18]",

and the Court also observed[19]:

> "The circumstance that the deposit forfeited to the taxpayer had various characteristics does not mean that the taxpayer may fix upon such one or more of these characteristics as it selects to demonstrate that there was no taxable supply. It is sufficient for the Commissioner's case that the presence of one or more of these characteristics satisfies the criterion of 'consideration' for the application of the GST provisions respecting a 'taxable supply'. One of the characteristics of the deposit was that upon its payment on 5 February 2002 it operated as a security for the performance of the obligation of the purchaser to complete the Contract and was liable to forfeiture on that failure. That is sufficient for the Commissioner's case."

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16 (2007) 160 FCR 433 at 445.

17 (2008) 236 CLR 342 at 348 [13].

18 cf *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 13; [1973] HCA 14; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 426 [96]; [1999] HCA 5; *Risk v Northern Territory* (2002) 210 CLR 392 at 418 [82]; [2002] HCA 23.

19 (2008) 236 CLR 342 at 352 [28].

27 Division 99, to which reference has been made above, was described by this Court[20] as a "wait and see" provision, whereby a deposit was taken to be consideration only when it was forfeited. The case provides no support for the proposition adopted by the Full Court in the present case that it was necessary to extract from the transaction between the airline and the prospective passenger the "essence" and "sole purpose" of the transaction.

The Commissioner's case

28 The principal submission by the Commissioner is that the unused fares were received or invoiced in the assessed tax periods and that this was on or pursuant to the making of a contract between the airline and the customer under which the airline supplied rights, obligations and services in addition to the proposed flight. These rights, obligations and services comprised "payment ... in connection with a supply" thereof within the meaning of the definition of "consideration"[21], so that there was a taxable supply attributable to that period. This submission requires further attention to the terms of the arrangements between Qantas and Jetstar and the customer.

The Qantas and Jetstar arrangements

29 The Full Court stated the following conclusions as to the effect of the Qantas conditions and the Jetstar conditions[22]. Using "Q" to identify the former and "J" to identify the latter:

> "(1) A person can make a reservation (Qantas) or booking (Jetstar) without making any payment, but: if Qantas has not received payment for the ticket on or before the specified ticketing time, Qantas may cancel the reservation [Q 4.3] and, in consequence, travel will not be allowed [Q 4.2]; and, if Jetstar has not received payment, the person will not be carried, even if they have a booking [J 4.2].
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> (2) A person buys a Qantas ticket by paying the applicable fare, applicable fees or charges and all government taxes [Q 5.5]; a person does not buy, but only makes a Qantas reservation [Q 4.1]; a

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20 (2008) 236 CLR 342 at 354 [35].

21 Section 9-15(1)(a).

22 (2011) 195 FCR 260 at 272.

person both makes [J 4.1] and pays for a Jetstar booking by paying the applicable fare, applicable surcharges, fees or taxes, and any applicable amounts relating to changes to the booking [J 5.5].

(3) The fare covers the flight for the person and the person's Baggage Allowance from the airport at the place of departure specified on the Ticket (Qantas)/in the booking (Jetstar) to the airport at the place of destination specified on the Ticket (Qantas)/specified in the booking (Jetstar) [Q and J 5.1].

(4) A person may purchase a Qantas ticket without a reservation (an open-dated ticket), but the person will not be able to travel until the person makes a reservation in a specified class of service and on a specified date and flight [Q 4.2]. With Jetstar, a person cannot hold an open booking [J 6.2(a)].

(5) With Qantas, a person cannot fly without making a specified reservation, in a specified class of service and on a specified date and flight [Q 4.2]; with Jetstar, a person cannot travel without a booking on a specific flight [J 6.2(a)]."

30 The critical provision in the Qantas conditions is set out in cl 9.2, headed "Late or Cancelled Flights (Except in Circumstances Beyond Our Control)":

"*We will take all reasonable measures necessary to carry you and your baggage and to avoid delay in doing so.* In doing so and in order to prevent a flight cancellation, in exceptional circumstances we may arrange for a flight to be operated on our behalf by an alternative carrier and/or aircraft.

Except:

- as otherwise provided by the convention or other applicable laws, or
- in circumstances where the delay or cancellation is beyond our control (eg bad weather, runway closure, air traffic control issues)

If we:

- cancel a flight
- fail to operate a flight reasonably according to the flight schedule

- fail to stop at your destination or stopover destination, or
- cause you to miss a connecting flight on your ticket on which you hold a confirmed reservation,

you can choose one of the following three options:

Option 1 - we will carry you at the earliest opportunity on another of our scheduled services on which space is available without additional charge and, where necessary, extend the validity period of your ticket.

Option 2 - we will within a reasonable period of time re-route you to the destination shown on your ticket by our own services or those of another carrier, or by other mutually agreed means (eg by bus) and class of transportation, without additional charge. If the fare and charges for the revised routing are lower than what you have paid, we shall refund the difference, or

Option 3 - we will make a refund in accordance with the provisions of 13.

Subject to the provisions of 6.9 and 9.1 above, these shall be the only remedies available to you and we shall have no further liability to you unless otherwise specified by the convention or any applicable laws." (emphasis added)

Clause 13 makes limited provision for refunds upon application.

31 The term "convention" is defined in cl 1 so as to include the Warsaw Convention, the Hague Protocol, the 1999 Montreal Convention, the Guadalajara Convention, and the Montreal No 4 Convention. The Commissioner makes the undisputed point that none of these, nor the provisions of Pts IV[23] and IVA[24] of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth), is applicable to the present case where what is in issue are flights booked but not utilised.

32 Clause 9 of the Jetstar conditions is headed "Schedules, Late or Cancelled Flights". Paragraph (a) of cl 9.1 states:

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23 Headed: "Other carriage to which this Act applies".

24 Headed: "Carriers to be insured against liability to passengers for death or personal injury".

> "Jetstar does not guarantee it will be able to carry you and your Baggage in accordance with the scheduled date and time of the flights specified. Schedules may change without notice for a range of reasons including but not limited to bad weather, air traffic control delays, strikes, technical disruptions and late inbound aircraft. Flight times do not form part of your contract of carriage with us."

Conclusions

33 The Qantas conditions and the Jetstar conditions did not provide an unconditional promise to carry the passenger and baggage on a particular flight. They supplied something less than that. This was at least a promise to use best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operations of the airline[25]. This was a "taxable supply" for which the consideration, being the fare, was received.

34 The GST payable for that taxable supply was attributable to and included in the calculation of the Qantas net amount for the tax periods in issue in this litigation and the assessments objected to were not shown to be excessive.

Orders

35 The appeal should be allowed with costs, the orders of the Full Court of the Federal Court should be set aside and the proceeding in that Court should be dismissed with costs.

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25 See *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 at 101, 107; [1980] HCA 15; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 64-65, 91-92, 116-117, 120, 137-138; [1984] HCA 64.

36 HEYDON J. Members of the travelling public often make a reservation for a flight, pay for it, do not turn up, and then fail to exercise any contractual right they may have to a refund of the fare. This appeal concerns the tax consequences relating to that part of a passenger's fare attributable to goods and services tax ("GST") which has been paid to the appellant. Is it to be retained by the appellant on the basis propounded by the appellant, that there has been a taxable supply – of a reservation and a conditional right to be carried – despite the fact that the relevant passenger never flew? Or is it to be returned to the respondent on the basis propounded by the respondent, that since the relevant passenger never flew, there has not been any taxable supply?

37 The problem raised by the appeal can be answered in brief terms as follows. The expression "taxable supply" appears in s 9-5 of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the Act"). Section 9-5 provides that a taxpayer makes a taxable supply if the taxpayer makes "the supply for consideration". A supply by a taxpayer implies that the taxpayer has supplied something to someone else[26]. Internal preparations by a taxpayer to supply a service do not themselves constitute a supply[27]. Hence the respondent's conduct in reserving a seat for a passenger by setting aside a seat in its internal reservation system – which could be reallocated at will, and which did not have to be given to the passenger for whom it had been set aside – was an act of preparation for supply, not a supply. The expression "supply for consideration" connotes a bargained-for exchange of value for performance. What, then, was the bargain?

38 The parties agreed that when a passenger books and pays for a seat with the respondent, arrives at the airport and is flown to his or her destination, the respondent can be said to have made "a supply for consideration". The consideration is the passenger's fare money. But "for" what act did the passenger pay that fare money? As a matter of ordinary English, what was supplied for the passenger's fare money? Was it a promise to provide an air journey? Though in practice usually fulfilled, that promise is highly conditional. Further, it is not specifically enforceable, and unlikely to lead to the recovery of damages for breach. Or is what was supplied for the passenger's fare money an actual air journey? It is submitted that the answer is, again as a matter of ordinary English, "an actual air journey". If so, when a passenger books and pays for his or her

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26 *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* (2006) 152 FCR 461 at 466 [16].

27 *Canada v Calgary (City)* (2012) 344 DLR (4th) 577 at 591 [40] per Rothstein J (McLachlin CJC, LeBel, Deschamps, Cromwell, Moldaver and Karakatsanis JJ concurring): "work preparatory to, or in order to make a supply, does not become a separate service subject to GST."

seat but does not arrive at the airport and makes no journey by air, nothing has been supplied for consideration.

39 This reasoning can be expanded a little.

40 Both parties treated *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd*[28] as a binding authority on the construction of s 9-5 read with s 9-10, which defines "supply". However, it is distinguishable. It affords no positive support to either side.

41 The Full Court of the Federal Court of Australia said[29]: "what each customer pays for is carriage by air. This is the essence, and sole purpose, of the transaction." The appellant criticised the expression "essence, and sole purpose". The appellant said that this issue did "not address, or arise under, the language of the statute." However, there is authority, which the appellant did not attack, that in assessing what a "taxable supply" is, it is material to examine the "evident purpose" of the transaction[30], its "legal substance" and "pith and substance"[31], and its "direct object"[32].

42 The transaction between the respondent and an intending passenger was not a nullity. It was not a sham. It was not illusory. It was not analogous to a "promise" to supply peas, but if there were no peas, to supply beans, or anything else, or nothing at all. On the appellant's case, the transaction between the respondent and the intending passenger created a duty on the respondent and a correlative right in favour of the intending passenger. The duty on the respondent was to take all reasonable measures to carry the intending passenger and his or her baggage without delay. The transaction was a contract of carriage by air – a conditional contract in numerous respects, but still a contract of carriage by air. Under that contract the respondent promised to supply the service of an air journey. Because the passengers with whom this appeal is

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28 (2008) 236 CLR 342; [2008] HCA 22.

29 *Qantas Airways Ltd v Federal Commissioner of Taxation* (2011) 195 FCR 260 at 278 [56] per Edmonds and Perram JJ (Stone J concurring).

30 *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at 521 [32] per French CJ and Hayne J; [2010] HCA 33.

31 *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at 524 [47] per Heydon J.

32 *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510 at 535 [99] per Crennan and Bell JJ.

concerned did not make themselves available to enjoy that service, the respondent did not supply them with any air journeys.

43 The Administrative Appeals Tribunal found as a fact that "the actual carriage of the passenger" was "obviously the purpose of each reservation."[33] In a sense the respondent supplied services or created a qualified right or entered a qualified obligation when it accepted the fare and made the reservation. But that stage of the transaction was incidental and preparatory to the central purpose, substance and object of the transaction – an actual air journey. What the intending passenger wanted was not so much a chose in action – a qualified promise to supply an air journey which it would be difficult to enforce legally. The intending passenger wanted the actual supply of an air journey. This, through no fault of its own, the respondent never supplied.

44 The appellant's argument was:

> "It is not necessary for taxpayers to value what is supplied, nor to identify whether there is more than one component of the supply (or more than one supply) in connection with which the consideration is paid, nor to allocate the consideration among any such components, nor to identify the tax periods in which components might have been supplied: it is payment of consideration which determines when, and how much, GST must be paid.
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> …
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> The legislative scheme is that the amount to be paid to (or by) the Commissioner – the net amount for a tax period – is fixed by what consideration is first paid or invoiced in the period. That amount is not retrospectively reduced because in a later tax period one of the supplies for which consideration has been invoiced or paid is not made." (footnotes omitted)

On this analysis, the bookings made by the respondent, the tickets issued by the respondent and the payment made by the intending passenger create a supply of services or rights sufficient to attract GST, even if the fare payment is eventually refundable. This analysis would surprise the passenger. It is an analysis which operates entirely independently of the subject-matter of the contract and the bargained-for advantage. What the passenger wants is an actual air journey, not a heavily conditional promise to supply one.

45 The parties agreed that there was only a single taxable supply. The respondent submitted that it made a conditional contract to carry the passenger by air, and that if no air journey took place, it had not supplied anything. On the

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33 *Qantas Airways Ltd v Commissioner of Taxation* (2010) 119 ALD 199 at 205 [10].

other hand, the appellant submitted that when a passenger paid a fare, that passenger was supplied with a reservation in consideration of the fare paid. Thus the appellant concentrated on the making of a promise to supply an air journey. The respondent concentrated on the extent to which an air journey actually took place. The appellant concentrated on what was supplied when the seat was reserved and paid for. The respondent concentrated on what was not supplied when the passenger failed to attend at the time when the promised air journey was supposed to take place. The appellant said that the taxable supply was entering the contract to provide an air journey. The respondent said that the taxable supply was the actual provision, under contract, of an air journey.

46 An interpretation of s 9-5 as fastening on the latter supply conforms more closely to practical reality. It prevents GST from being charged in relation to a promise to supply an air journey which the passenger's conduct prevented from being fulfilled and (in some instances) a promise to refund the fare which the passenger did not seek to have fulfilled. The fare was paid not to get a conditional promise to supply an air flight (which promise did take place) but to get an actual air journey (which never took place).

47 The respondent's position does have a superficially unattractive feature. The respondent seeks to acquire money paid by passengers who intended or expected that it would end up in the hands of the appellant, not those of the respondent. If the respondent's argument is correct, the passengers who have not claimed their fares back have left the respondent in a position to gain money which it was never meant to have. The lack of attractiveness in the respondent's position is not fundamental. So far as the contracts of passengers with the respondent did not give them any right to reclaim their fares, they have no cause for complaint. The position in which they find themselves is a result of their contractual choice. So far as the contracts of passengers with the respondent did give them a right to reclaim their fares which they have not exercised, they have no cause for complaint. The position in which they find themselves is a result of their failure to exercise their contractual rights to repayment. And the appellant cannot complain about not being able to retain money which the Act does not permit it to retain.

48 The appeal should be dismissed essentially for the reasons given by the Full Court. Thus there is no need to deal with the four grounds raised in the respondent's notice of contention, which both parties addressed at length.

49 The appeal should be dismissed with costs.