HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, GAGELER AND KEANE JJ

COMMISSIONER OF TAXATION APPLICANT

AND

UNIT TREND SERVICES PTY LTD RESPONDENT

Commissioner of Taxation v Unit Trend Services Pty Ltd
[2013] HCA 16
1 May 2013
B61/2012

ORDER

1. *Special leave to appeal granted.*

2. *Appeal allowed.*

3. *Set aside orders 2, 7 and 8 of the orders of the Full Court of the Federal Court of Australia made on 5 October 2012 and, in their place, order that:*

   (a) *the issue of remission of penalty in relation to the declaration pursuant to s 165-40 of the* A New Tax System (Goods and Services Tax) Act *1999 (Cth) be remitted to the Administrative Appeals Tribunal for further consideration;*

   (b) *Unit Trend Services Pty Ltd pay the Commissioner of Taxation's costs of, and incidental to, the appeal and cross-appeal in the Full Court; and*

   (c) *any monies paid into the Federal Court by Unit Trend Services Pty Ltd as security for costs be paid out of court to the Commissioner of Taxation together with accretions, if any.*

4. *Unit Trend Services Pty Ltd pay to the Commissioner of Taxation his costs of, and incidental to, the appeal.*

On appeal from the Federal Court of Australia

Representation

B D O'Donnell QC with S R Lumb for the applicant (instructed by McInnes Wilson Lawyers)

F L Harrison QC with P G Bickford for the respondent (instructed by MS & Cliff Lawyers Pty Ltd)

CATCHWORDS

Commissioner of Taxation v Unit Trend Services Pty Ltd

Taxation – GST – Application of margin scheme – Anti-avoidance – Respondent representative member of GST group of companies – Where margin scheme applied to supply of units in property development – Where respondent engaged in "scheme" and obtained "GST benefit" – Whether s 165-5(1) of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) engaged – Whether GST benefit "not attributable to" making by respondent of choice, election, application or agreement expressly provided for by the GST law.

Words and phrases – "not attributable to".

A New Tax System (Goods and Services Tax) Act 1999 (Cth), Div 165, ss 165-5, 165-10.

1 FRENCH CJ, CRENNAN, KIEFEL, GAGELER AND KEANE JJ. The Commissioner of Taxation ("the Commissioner") seeks special leave to appeal from a decision of the Full Court of the Federal Court of Australia[1] ("the Full Court") upon a question concerning the interpretation of s 165-5(1)(b) of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act"). The question agitated by the application is whether GST benefits obtained by the respondent, Unit Trend Services Pty Ltd ("Unit Trend"), are not attributable to the making of a choice, election, application or agreement (collectively "a choice") that is expressly provided for by the GST Act.

2 This question was resolved by the Administrative Appeals Tribunal ("the Tribunal") in favour of the Commissioner[2], and subsequently on appeal by the Full Court in favour of Unit Trend.

3 For the reasons that follow we would grant the Commissioner's application for special leave and allow the appeal. The reasons set out the material provisions of the GST Act, the facts of the case, which are not in controversy, the reasons of the Tribunal and the Full Court in summary, followed by discussion of the arguments raised by the parties in this Court.

The GST Act

4 Division 165 contains the anti-avoidance provisions of the GST Act. They operate to nullify schemes which have the purpose or effect of reducing GST, increasing refunds, or altering the timing of payment of GST or refunds[3]. Such effects are described as GST benefits. In broad summary, Div 165 applies where:

(a) there is a scheme, from which an entity gets a GST benefit;

(b) the entity or some other entity entered into or carried out the scheme for the sole or dominant purpose of getting the GST benefit;

(c) alternatively to (b), the principal effect of the scheme was that the entity or some other entity gets the GST benefit; and

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1 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29.

2 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497.

3 *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), s 165-1.

(d) the GST benefit is not attributable to the making by the entity of a choice expressly provided for under the Act.

5 Where those requirements are satisfied, the Commissioner is empowered to make a declaration negating the GST benefit[4].

6 Section 165-10(1) explains what is involved in the getting of a GST benefit relevantly as follows:

"An entity gets a ***GST benefit*** from a *scheme if:

(a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme".

(Terms which are defined within the Act are marked with an asterisk.)

7 The term "scheme" is defined by s 165-10(2) in these terms:

"A ***scheme*** is:

(a) any arrangement, agreement, understanding, promise or undertaking:

(i) whether it is express or implied; and

(ii) whether or not it is, or is intended to be, enforceable by legal proceedings; or

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise."

8 Section 165-5 describes the circumstances in which Div 165 operates. It now provides:

"*General rule*

(1) This Division operates if:

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4 *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), s 165-40.

(a) an entity (the ***avoider***) gets or got a *GST benefit from a *scheme; and

(b) the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the *GST law, the *wine tax law or the *luxury car tax law; and

(c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:

(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a *GST benefit from the scheme; or

(ii) the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly; and

(d) the scheme:

(i) is a scheme that has been or is entered into on or after 2 December 1998; or

(ii) is a scheme that has been or is carried out or commenced on or after that day (other than a scheme that was entered into before that day).

Territorial application

(2) It does not matter whether the *scheme, or any part of the scheme, was entered into or carried out inside or outside Australia.

Creating circumstances or states of affairs

(3) A *GST benefit that the avoider gets or got from a *scheme is not taken, for the purposes of paragraph (1)(b), to be attributable to a choice, election, application or agreement of a kind referred to in that paragraph if:

(a) the scheme, or part of the scheme, was entered into or carried out for the sole or dominant purpose of creating a circumstance or state of affairs; and

(b) the existence of the circumstance or state of affairs is necessary to enable the choice, election, application or agreement to be made."

9 It is to be noted that s 165-5(3) was not part of the GST Act at the time in question but was added by the *Tax Laws Amendment (2008 Measures No 5) Act* 2008 (Cth).

10 Ordinarily, the amount of GST on a taxable supply is 10% of the value of the taxable supply[5]; but by s 75-10 of the GST Act as it stood at the time of the transactions in question, if the margin scheme applied, the GST was calculated by reference to the increased value, after acquisition and before supply, of the thing supplied, rather than by reference to the whole value of the thing supplied. Further, s 38-325 of the GST Act permits relief from GST in the case of a supply which involves the sale of a going concern.

The facts

11 Unit Trend is the representative member of a GST group of companies[6] which included Simnat Pty Ltd ("Simnat"), Blesford Pty Ltd ("Blesford") and Mooreville Investments Pty Ltd ("Mooreville"). Each of those companies was a wholly owned subsidiary of Raptis Group Limited ("Raptis").

12 By a contract completed on 20 April 1999, Simnat purchased a parcel of land at Surfers Paradise on the Gold Coast for $30 million. Simnat obtained development approval from the Gold Coast City Council to construct three high-rise towers containing residential apartments on the land. These towers are referred to as "Tower I", "Tower II" and "Tower III".

13 On 31 July 2001 Simnat engaged another Raptis company, Rapcivic Contractors Pty Ltd ("Rapcivic"), to construct Tower I. Simnat sold units in Tower I to members of the public. The "margin scheme" under Div 75 of the

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5 *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), ss 7-1 and 9-70.

6 Approved by the Commissioner for that purpose under s 48-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

GST Act[7] was applied to those sales by business activity statements ("BAS") lodged as the sales progressed.

14 By a contract dated 1 July 2002, Simnat engaged Rapcivic to construct Tower II. Simnat began selling units in Tower II off the plan. On 13 December 2002, a survey plan was registered. It subdivided the original block so that the land on which Towers II and III were to be constructed was subdivided into separate lots with separate titles.

15 On 14 April 2004 a contract was executed for the sale of Tower II by Simnat to Blesford ("the Tower II contract"). This sale was agreed to be the supply by Simnat of a "going concern"[8]. The sale was completed on 7 May 2004. At this time, the construction of Tower II was at an advanced stage (construction was completed in June 2004) and Simnat was the nominated vendor of 230 of the 289 apartments in Tower II.

16 The Tower II contract provided for the price to be determined by an independent valuer[9]. It was subsequently fixed at $149.8 million. By the Tower II contract, Simnat assigned to Blesford all of its right, title and interest in each unit contract in Tower II[10]. The benefit of the building contract for Tower II was also assigned by Simnat to Blesford.

17 By a contract dated 29 January 2003, Simnat engaged Rapcivic to construct Tower III. Simnat began selling units in Tower III off the plan. On 15 April 2004 (the day after the Tower II contract) a contract for the sale of Tower III by Simnat to Mooreville ("the Tower III contract") was executed. Once again, the sale was agreed to be the supply by Simnat of a "going concern". The sale was completed on 23 November 2004. At the time of transfer, Tower III was at an advanced stage of construction and Simnat was named as the vendor of 142 of the 241 units.

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7 Settlements (supplies) made prior to 17 March 2005 were governed by Div 75 as it stood prior to the commencement of the *Tax Laws Amendment (2005 Measures No 2) Act* 2005 (Cth), and settlements on or after 17 March 2005 were governed by Div 75 as amended.

8 Special Condition 3.1 of the Tower II contract.

9 Special Condition 17.1 of the Tower II contract.

10 Special Condition 6.1 of the Tower II contract.

18 The Tower III contract also provided for the price to be determined by an independent valuer. It was subsequently fixed at $109.5 million. The Tower III contract also provided for an assignment to Mooreville of all contracts for sale of units in the building that Simnat had entered into. The benefit of the building contract for Tower III was also assigned by Simnat to Mooreville.

19 Blesford and Mooreville completed the construction of Towers II and III and continued marketing and selling the remaining apartments. Following completion of Towers II and III, Blesford and Mooreville settled all sales of units in the respective Towers (including contracts entered into by Simnat as well as contracts which they had entered into with end buyers).

20 The margin scheme was applied to the sales to the end buyers. Unit Trend chose to apply the margin scheme on the basis that the price paid by Blesford and Mooreville to Simnat was the relevant consideration for the purpose of determining the margin upon which GST would be determined. Unit Trend, as the group's representative entity, reported GST payable on sales of units in Towers II and III on that basis in its monthly BAS returns commencing in May 2004.

21 The Commissioner issued a declaration to Unit Trend under s 165-40(a) of the GST Act negating a total GST benefit in excess of $21 million. Following an unsuccessful objection by Unit Trend, Unit Trend applied to the Tribunal for a review of the Commissioner's decisions.

The decision of the Tribunal

22 The Tribunal found that there was a "scheme"[11] which comprised the following elements[12]:

> "(a) a group of companies that engage in property development (at least including companies A and B);
>
> (b) company A owns or buys land proposed for development, and undertakes the development to a point where the development has

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11 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 56-57 [110]-[111], [114].

12 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [85], [89].

substantially progressed, and the overall value of the development is considerably higher than the price A paid for the land;

(c) company A sells the partially completed development to company B at market value. The timing of the sale is to occur at a time when the market value is significantly higher than the price A paid for the land;

(d) the sale by A to B is to be free of GST (either because it is a sale of a going concern, or because A and B are within a registered GST group under Division 48);

(e) company B completes the development, and sells to end buyers. Any sales made by A to end buyers would be honoured and completed by B;

(f) upon transfer to end buyers, company B would choose to apply the margin scheme in respect of its liability for GST (calculated based upon consideration B provided to A)."

23 In determining whether Unit Trend "got" a GST benefit from the scheme, the Tribunal found[13] (in respect of all contracts that settled prior to 17 March 2005) that, absent the scheme:

(a) there would have been no transfer of Towers II and III to Blesford and Mooreville, Simnat would have continued as the owner and developer of Towers II and III, Simnat would have been the vendor under contracts for the sale of units in Towers II and III, and Simnat would have completed all contracts of sale;

(b) Simnat would have elected to apply the margin scheme in respect of all sales;

(c) the GST (on the sale to end buyers) would have been calculated on the margin between:

(i) Simnat's sale price to the end buyers; and

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13 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [97], [100]-[102]; *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 58-59 [119]-[123], 66 [156].

(ii) the value of what was sold to the end buyers based upon a proportion of the value of the property as at 1 July 2000.

24 The Tribunal found[14] for the purpose of s 165-5(1)(a) of the GST Act that the GST benefit got by Unit Trend from the scheme (on all sales that settled prior to 17 March 2005) was the GST payable on the difference between the sale price to the end buyer and a proportionate share of the value of the property as at 1 July 2000, less the GST payable on the difference between the sale price to the end buyer and a proportionate share of the $149.8 million and $109.5 million paid by Blesford and Mooreville respectively to Simnat.

25 In respect of those contracts of sale that were settled before 17 March 2005 and in respect of which Simnat was the original contracting party, the Tribunal found that:

(a) the dominant purpose of those who entered into and carried out the scheme was to secure the GST benefit[15]; and

(b) the principal effect of the scheme was the achieving of the GST benefit[16].

26 The choices and agreements relied upon by Unit Trend before the Tribunal in relation to s 165-5(1)(b) were[17]:

"(a) the choices made by Blesford and Mooreville to become members of the GST group, [being] a choice made under s 48-5 of the GST Act;

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14 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [102].

15 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [148].

16 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [161].

17 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [105]; *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 60 [132].

(b) the agreement by Simnat and Blesford that the supply of Tower II was of a going concern, [being] an agreement made under s 38-325(1)(c) of the GST Act;

(c) the agreement by Simnat and Mooreville that the supply of Tower III was of a going concern, [being] an agreement made under s 38-325(1)(c) of the GST Act;

(d) the choices made by Blesford and Mooreville to apply the margin scheme, [in respect of supplies to end buyers, each being] choices made under s 75-5 of the GST Act [by the monthly BAS returns]."

27 In relation to s 165-5(1)(b) of the GST Act, the Tribunal concluded[18]:

"We take the view that the purpose of s 165-5(1)(b) is to preserve entitlements to benefits (measured in terms of reductions in GST that would otherwise apply) as a consequence of specified legislative provisions which create those benefits. We take the view that this exclusion does not extend to benefits that have some connection with choices that are provided for where the benefit is not explained by the choice but is explained by something else – in this case the sales of Tower II and Tower III by Simnat to Blesford and Mooreville. The GST benefit here is attributable to the use of the higher amount as the consideration for the acquisition used in the calculation of the margin under the margin scheme rules." (footnote omitted)

28 Accordingly, the Tribunal affirmed the Commissioner's declaration in relation to the application of the anti-avoidance provisions of Div 165 in so far as the proceedings concerned supplies made prior to 17 March 2005[19] pursuant to contracts originally entered into by Simnat.

29 Unit Trend appealed to the Full Court of the Federal Court. On the appeal Unit Trend did not dispute the existence of the scheme found by the Tribunal.

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18 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [110], citing Pagone, *Tax Avoidance in Australia*, (2010) at 149.

19 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [102], [104], [175].

The decision of the Full Court

30 The Full Court, by Bennett and Greenwood JJ (Dowsett J dissenting), held that the anti-avoidance division, Div 165, did not apply in relation to the supplies up to and including 16 March 2005, and that, accordingly, the Tribunal's decision should be set aside[20]. Their Honours held that the GST benefit was attributable to the making of a choice or agreement expressly provided for by the GST Act.

31 The majority regarded s 165-5(1)(b) as inviting an inquiry into causality. Their Honours considered the possibility that that inquiry was whether the making of a statutory choice was the predominant or direct cause of the GST benefit. Their Honours said[21]:

> "[T]he language of s 165-5(1) in the context of the Division as a whole, preventing the Division from operating, seems to more properly contemplate causation in an allocative sense asking whether the nexus between the GST benefit and the exercise of the statutory choice is sufficiently close to provide an answer to the question, is the choice etc made by the taxpayer as expressly provided by a GST law, the predominant cause or the direct cause of the GST benefit? In that sense, the subsection does not import by its terms in the context of the Division and the Act a concept of causation in which the relevant choice etc is simply one of a number of contributory causes, as a sufficient connection. Otherwise, the Division would seem to have little field of operation."

32 Nevertheless, their Honours went on to consider, and to apply, "a concept of causation in which the relevant choice etc is simply one of a number of contributory causes"[22]. In this regard, their Honours began[23]:

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20 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 77 [204], [206].

21 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 75 [194].

22 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 75 [194].

23 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 75 [195]-[196].

> "However, if, having regard to the legislative purpose, a view is formed that 'attributable to' imports the notion of causation in the sense of 'some connection' or a 'causal link alone' or a test of attributability that does not involve any qualification or limitation conveyed by such terms as 'sole, dominant, direct or proximate' or the notion that 'a contributory causal connection is quite sufficient', then, clearly enough, Unit Trend has satisfied that test of causation and the GST benefit is attributable to a causal link alone consisting of the exercise of one or more choices expressly provided for by the Act.
>
> The GST benefit in this case is sourced in the scheme having regard to all of the elements of that scheme as found on the facts. Section 165-5(1)(b) asks whether the GST benefit obtained from the scheme is caused in an allocative sense by the choices made by the taxpayer in the sense of belonging to the choices, elections or agreements expressly provided for by the GST law."

33 It may be noted that the focus of their Honours' attention was upon the word "attributable", not upon the phrase actually used by s 165-5(1)(b), "not attributable". This focus may have influenced their ultimate conclusion that s 165-5(1)(b) invites attention to a notion of causation which is satisfied by "some connection" between the GST benefit and the exercise of a statutory choice.

34 The majority went on to identify the choices associated with the getting of the GST benefit and to conclude that the GST benefit in question was "attributable" to choices expressly provided by the GST Act[24]. The choices were:

- The supply and acquisition of land as part of a going concern and intra-group transactions giving rise to GST-free transfers.
- Application of the margin scheme to end sales.

Absent those choices the GST benefit on the end purchaser transactions would not have arisen. It was therefore attributable to those choices for which the GST Act expressly provided.

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24 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 75-76 [198]-[199].

35 The majority seem to have proceeded to this conclusion on the footing that s 165-5(1)(b) invited the application of a "but for" test of causation. Their Honours said[25]:

> "But for the making of the choice or election to transfer Towers II and III as a going concern in conformity with s 38-325(1)(c), a GST liability would have arisen by reason of the settlement of each transfer."

36 In the result, their Honours held[26]:

> "It follows that for all settlements up to and including 16 March 2005, Div 165 did not operate because it was excluded as the GST benefit on the end purchaser transactions was attributable to the choices etc made by Unit Trend as described. It also follows that the Tribunal's decision affirming the Commissioner's objection decision in relation to settlements by Simnat of Simnat contracts up to and including 16 March 2005 must be set aside."

37 Dowsett J, in his dissent, rejected the approach urged by Unit Trend to the effect that any causal connection between the GST benefit and the making of a statutory choice was sufficient to remove the GST benefit from the scope of Div 165 of the GST Act. In his view the provision seemed to contemplate a direct link between the benefit and the relevant choice. He thought it most unlikely that Parliament intended that an outcome attributable to numerous choices would be excluded from the general operation of Div 165. His Honour said[27]:

> "Where one benefit is attributable to the interaction of numerous choices, it would be more accurate to attribute such benefit to that interaction, rather than to individual choices, taken discretely. The position may be otherwise where the scheme yields discrete benefits, each of which is attributable to a different, discrete choice."

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25 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 76 [201].

26 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 77 [206].

27 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 44 [47].

38 As his Honour observed, the scheme which produced the GST benefit included the intra-group sales, which lay at the heart of the scheme, even if the various choices made under the GST Act were necessary integers of it. His Honour concluded[28]:

> "the GST benefit was attributable to the events of which such sales were necessary parts, in other words, the scheme. In those circumstances, the benefit was attributable to the scheme, and not to any particular choice expressly provided for by the GST law."

39 As appears from what follows, we agree with the conclusion of Dowsett J. We do not find it necessary to come to a final conclusion as to whether the reference in s 165-5(1)(b) to "a choice" includes multiple choices each expressly authorised by the GST Act.

The Commissioner's arguments

40 The Commissioner submits that the decision of the majority in the Full Court does not "best achieve the purpose or object" of Div 165[29], in that the purpose of s 165-5(1)(b) was to prevent the anti-avoidance provisions in Div 165 applying to a person merely by reason of the exercise of a right to make a choice expressly provided for by the GST Act[30]. Because the word "scheme" is defined by the GST Act in wide terms, it can readily encompass the making of a choice expressly provided for by the GST Act. Accordingly, s 165-5(1)(b) is intended to make Div 165 inapplicable where the GST benefit is produced by an individual statutory choice, taken discretely[31], but only in such a case.

41 The Commissioner also argues that a mere contributory causal connection with a statutory choice is not sufficient to remove a scheme from Div 165. The Commissioner says that there must be a connection between the statutory choice

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28 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 44 [48].

29 cf s 15AA of the *Acts Interpretation Act* 1901 (Cth).

30 cf *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 74-75 [192] per Bennett and Greenwood JJ; see also at 43 [41] per Dowsett J.

31 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 44 [46]-[47] per Dowsett J.

and the GST benefit which is closer than that which is represented by an affirmative answer to a "but for" test. Rather, there must be a relationship of proximate or immediate cause and effect between the making of a choice expressly provided for by the GST Act and the getting of the GST benefit[32]. This argument draws upon the view of Dowsett J that there must be a "direct link" between the GST benefit and the choice[33].

Unit Trend's arguments

42 Unit Trend advances three arguments with a view to sustaining the decision of the Full Court. Unit Trend's first argument is that s 165-5(1)(b) proceeds on the footing that a scheme which confers a GST benefit may be removed from the scope of Div 165 of the GST Act by a statutorily authorised choice which is but one element or step in a scheme which has generated the GST benefit.

43 In support of that approach, Unit Trend relies upon *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (In liq)*[34]. In that case this Court was concerned, among other things, to construe s 160ZK(5) of the *Income Tax Assessment Act* 1936 (Cth). It is important to note that s 160ZK(5) provided that, if a company made a distribution in respect of a share to a company that was a controlling shareholder, and, to the extent that the distribution was a dividend, the company was entitled to a rebate under s 46 or s 46A, then the company was entitled to a rebatable dividend adjustment. A rebatable dividend adjustment was the amount of the distribution that could reasonably be taken to be attributable to profits that were derived by the company before the controlling shareholder acquired the share.

44 In this Court's reasons for judgment[35] it was said that s 160ZK(5) "presents an inquiry as to the existence of a sufficient link between that ...

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32 cf *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 598 [101]; [2005] HCA 26.

33 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 44 [46].

34 (2005) 225 CLR 488; [2005] HCA 70.

35 *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (In liq)* (2005) 225 CLR 488 at 514 [77].

distribution and profits derived by the company before a specified event". Unit Trend relies on the following passage[36]:

> "It is the concept of causation, rather than source, with which s 160ZK(5) is concerned. In determining whether the plaintiff's loss of employment was 'attributable to' the provisions of the *Local Government Act 1972* (UK), Donaldson J in *Walsh v Rother District Council* said[37]:
>
> > '[T]hese are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient.'
>
> Nothing, either in the text of s 160ZK(5) or in its objects as expressed in the Explanatory Memorandum on the Bill for the Amending Act, indicates that a narrower meaning should be presently ascribed to that phrase."

45 Unit Trend's second argument is to the effect that a GST benefit arose only on the making of each choice to apply the margin scheme to an end sale. On this view, the relationship between the choice to apply the margin scheme and the GST benefit satisfies even the test of proximate or immediate cause urged by the Commissioner. That is said to be because the GST benefits in question were not "got" from the scheme identified by the Tribunal, but directly by the choices to apply the margin scheme after the sales of the developed product by Blesford and Mooreville were completed. These choices were made in the monthly BAS returns after May 2004.

46 Thirdly, Unit Trend argues that the addition of s 165-5(3) to Div 165 of the GST Act, since the transactions in question were effected, reflects an appreciation on the part of the Parliament that, without s 165-5(3), s 165-5(1)(b) was not apt to exclude GST benefits of the kind in question from the scope of Div 165. This argument is advanced, both against the grant of special leave to appeal, and in support of the decision of the Full Court.

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36 *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (In liq)* (2005) 225 CLR 488 at 514-515 [80].

37 [1978] 1 All ER 510 at 514.

Discussion

47 As French CJ, Hayne, Crennan, Bell and Gageler JJ said in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*[38]: "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". Context and purpose are also important. In *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*[39] French CJ and Hayne J said:

> "The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*[40], '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' ... That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole'[41], and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'[42]." (emphasis of French CJ and Hayne J)

48 With that observation in mind, it is to be noted that s 165-5(1)(a) poses a question which must be answered before one enters upon the inquiry invited by s 165-5(1)(b). That question is whether "an entity ... gets or got a GST benefit from a scheme". Under s 165-10(1)(a) an entity gets a GST benefit from a scheme "if … an amount that is payable by the entity under [the GST] Act … is, or could reasonably be expected to be, smaller than it would be apart from the

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38 (2012) 87 ALJR 98 at 107 [39]; 293 ALR 257 at 268; [2012] HCA 55.

39 (2012) 87 ALJR 131 at 138 [24]; 293 ALR 412 at 418; [2012] HCA 56.

40 (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

41 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320; [1981] HCA 26; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

42 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; [1955] HCA 27; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

scheme or a part of the scheme". Under the scheme found by the Tribunal, the amount of GST payable by Unit Trend is smaller than it would be without the scheme because of the intermediate sales by Simnat to Blesford and Mooreville. The GST benefit got from the scheme, and which Div 165 is being invoked to negate, is the benefit obtained as a result of the intermediate sales by Simnat to Blesford and Mooreville; the GST benefits associated with the choices to effect the sales as intra-group sales of a going concern are not in issue.

49 Section 165-5(1)(b) assumes that, in accordance with s 165-5(1)(a), an identified GST benefit has been "got ... from a scheme"; and proceeds from this postulate to invite attention to whether the particular GST benefit "got" from the scheme is "not attributable" to the making of a choice expressly provided by the GST Act. When s 165-5(1)(a) and (b) are read together, s 165-5(1)(b) may be read exegetically as: "the getting of the GST benefit by the avoider from the scheme is not attributable to the making of a choice", and it can be seen that the "non-attribution" with which s 165-5(1)(b) is concerned is the absence of statutory entitlement to get that GST benefit by the making of a choice authorised by the GST Act.

50 It is to be noted that the crucial phrase in s 165-5(1)(b) is "*not* attributable to". To consider the application of s 165-5(1)(b) as if it were concerned with whether a GST benefit is "attributable" to a choice is apt to distort somewhat the inquiry invited by the text by leading one to embark on an inquiry as to whether the GST benefit in question is an effect of the making of a statutory choice as distinct from the scheme. Section 165-5(1)(b) is necessarily concerned with a GST benefit which has been "got" from a scheme but which is, nevertheless, "not attributable to" a choice expressly provided by the GST Act. Section 165-5(1)(b) is concerned to include, within the scope of Div 165, GST benefits got from a scheme in which the exercise of a statutory choice has had some operation. On this analysis, the words "not attributable to" in s 165-5(1)(b) do not invite an inquiry as to causality to differentiate the effects of the scheme from the exercise of a statutory choice. Rather, the phrase is concerned with whether the GST benefit in question, which (ex hypothesi) has been got from the scheme, is not one to which the exercise of a statutory choice has entitled the taxpayer.

51 It should be noted that the observations in *Sun Alliance* on which Unit Trend relies were made in a markedly different context. While the word "attributable" was considered in *Sun Alliance* to be concerned with a contributory cause rather than source, the phrase "not attributable to" in s 165-5(1)(b) is used in a context in which a causal link is assumed to have been established in terms of the getting of a benefit from a scheme in which a statutory choice is an element. The expression "not attributable to" in s 165-5(1)(b) is not concerned to

identify another relationship of cause and effect which might or might not proceed on a different level of cause and effect from that expressed by "got … from". Rather, the expression is, in its context, concerned with the absence of a statutory entitlement to the GST benefit in question.

52 Considerations of relatively recent legal history lend support to the view that it is the absence of such an entitlement which justifies inclusion of that GST benefit within the scope of the anti-avoidance provisions of Div 165. It has long been recognised in Australia that the tension between general anti-avoidance provisions and specific provisions allowing the taxpayer a choice, which if exercised will yield the taxpayer a benefit, is to be resolved in favour of the specific provisions[43]. Section 165-5(1)(b) may readily be seen to exhibit the same intent as was ascribed to s 260 of the *Income Tax Assessment Act* 1936 (Cth) by Dixon CJ, Kitto and Taylor JJ in *W P Keighery Pty Ltd v Federal Commissioner of Taxation*[44], namely, "to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them."

53 It is tolerably clear from the legislative history of s 165-5(1)(b) that its purpose was to ensure that those GST benefits got from a scheme, but not attributable to the making of a statutory choice, are not immunised against the possible operation of the general anti-avoidance effect of Div 165. In its original form in the A New Tax System (Goods and Services Tax) Bill 1998 ("the GST Bill"), Div 165 did not contain what would become s 165-5(1)(b). The provision was subsequently included as an amendment to the GST Bill. The Supplementary Explanatory Memorandum tabled in the Senate in support of the amendments to the GST Bill ("the SEM") included, at par 1.118, the following explanation of the mischief at which s 165-5(1)(b) was directed:

> "Queries have been made about the scope of the current Division 165. It has been suggested that the Division may have unintended effects and may apply to transactions not intended to defeat GST law. In particular, it has been suggested that the exercise of an explicit option under the GST law may trigger the anti-avoidance provisions."

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43 See *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66 at 92; [1957] HCA 2.

44 (1957) 100 CLR 66 at 92.

54 The terms of the SEM confirm that the mischief at which s 165-5(1)(b) was directed was the possibility that, because of the wide definition of "scheme", Div 165 might bring within its reach a GST benefit, the getting of which is attributable to the making of a choice expressly provided for by the GST Act. It is evident that the insertion of s 165-5(1)(b) was intended to ensure that the GST Act did not contradict itself by allowing the general anti-avoidance provisions of Div 165 to trump specific provisions of the Act which allow an entity to get a GST benefit.

55 That view is confirmed by s 165-1 of the GST Act. Section 165-1 is an "explanatory section" within the meaning of s 182-10(1) of the GST Act. It may, pursuant to s 182-10(2)(b), be considered "to confirm that the provision's meaning is the ordinary meaning conveyed by its text, taking into account its context in this Act and the purpose or object underlying the provision". When what became s 165-5(1)(b) was added to the GST Bill, s 165-1 was amended to include in the explanation of what Div 165 is about the following:

> "This Division is aimed at artificial or contrived schemes. It is not, for example, intended to apply to:
>
> - an exporter electing to have monthly tax periods in order to bring forward the entitlement to input tax credits; or
>
> - a supplier of child care applying to register under the *Childcare Rebate Act 1993* (registration would make the supplies of child care GST-free); or
>
> - a supplier choosing under section 9-25 of the *A New Tax System (Wine Equalisation Tax) Act 1999* to use the average wholesale price method for working out the taxable value of retail sales of grape wine; or
>
> - a bank having its car fleet serviced earlier than usual, and before 1 July 2000, so that the servicing does not, at least initially, bear the GST."

56 The upshot of this analysis is that s 165-5(1)(a) and (b) require a GST benefit got from a scheme to be subject to scrutiny by reference to the other criteria in s 165-5 if the getting of the benefit referred to in s 165-5(1)(a) is not an entitlement the source of which is the making of a choice expressly authorised by another provision of the GST Act.

57 That being so, reference to the undisputed facts shows that the GST benefit in question was not attributable to the making of a statutory choice provided by the GST Act.

58 As we have said, the relevant GST benefit is not that to which Unit Trend was entitled by reason of intra-group sales or sales of a going concern. By reason of the statutory choices of the Raptis companies to become members of a GST group, and the agreements to transfer Towers II and III as going concerns, there was no GST payable on the intra-group transfers of those Towers. But the GST benefit in question was not attributable to those choices. The GST benefit got from the scheme reflected the amount agreed to be paid to Simnat as the consideration for the transfer of Towers II and III, which in turn reflected the increase in the value of the properties by reason of the work done upon them. That GST benefit was not something to which Unit Trend was entitled as a matter of the exercise of any statutory choice. It was what the majority in the Full Court characterised as "a commercial election or choice" involved in the transfer of the properties to Blesford and Mooreville in accordance with the scheme *after* the substantial increase in the value of the properties. This brought about the uplift in the intermediate cost base from which the GST benefit was got[45].

59 The result may also be explained by reference to s 165-10(1)(a). In accordance with s 165-10(1)(a), a GST benefit is an amount payable by or to an entity under the GST Act that is, or could reasonably be expected to be, smaller or larger "than it would be apart from the scheme or a part of the scheme". Under s 165-10(1)(a), the GST benefit the entity gets or got from the scheme is the difference, as to quantification, between: (a) an amount that would be payable by the entity under the GST Act absent Div 165 with the scheme in existence; and (b) such amount as would have been payable by the entity under the GST Act without the scheme in existence.

60 Determination for the purpose of s 165-5(1)(b) of the GST Act of whether the GST benefit so identified "is not attributable" to the making by an entity "of a choice … that is expressly provided for" by the GST Act or another relevant law involves consideration of how the entity referred to in s 165-5(1)(a) got or is getting the GST benefit identified for the purpose of s 165-5(1)(a). It looks to the same factual and counterfactual analysis required by s 165-10(1)(a). The

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45 *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at 76 [200]-[201].

identified GST benefit is not attributable to the making of a choice by the entity or some other entity if: (a) the GST Act or another relevant law does not operate to confer the identified GST benefit by reference to that choice; or (b) the choice made in fact as part of the scheme would have been made in any event without the scheme.

61 The choice made by Blesford and Mooreville under s 48-5 of the GST Act to become members of the GST group, and the agreements for the supply of Towers II and III as going concerns made between Simnat and Blesford and between Simnat and Mooreville respectively, as provided for by s 38-325(1)(c) of the GST Act, were choices that resulted in no GST being payable on the supplies by Simnat to Blesford and Mooreville. They were not choices and agreements by reference to which the GST Act operated to confer the GST benefit which the Tribunal identified as having been got by Unit Trend, being a reduction in the GST payable on supplies to end buyers.

62 The choice made by Blesford and Mooreville under s 75-5 of the GST Act to apply the margin scheme in respect of supplies to end buyers was the same choice as would have been made, albeit by Simnat, without the scheme.

63 For these reasons, we reject Unit Trend's first argument.

64 Unit Trend's second argument, namely that the GST benefit "got" by it from the scheme is attributable solely to its election to apply the margin scheme at the conclusion of sales of the developed products by Blesford and Mooreville, should also be rejected. This argument is framed in terms of when the GST benefit "arose". To frame the question in this way is to divert attention from the real issue, which is concerned with the GST benefit "got" from the scheme. That scheme included all the steps identified by the Tribunal.

65 It is important to bear in mind that s 165-5(1)(b) is concerned with the actual GST benefit which has been "got" from the scheme. By virtue of s 165-10(1)(a), that benefit is a matter of monetary value got from the scheme, rather than of legal forms or the timing of the getting of the benefit. The actual GST benefit in question here cannot be identified as a matter of monetary value without recognising the decisive effect of the uplift from the sales by Simnat to

Blesford and Mooreville upon the intermediate cost base. As the Tribunal explained[46]:

> "The GST benefit here is attributable to the use of the higher amount as the consideration for the acquisition used in the calculation of the margin under the margin scheme rules. This higher amount is not the product of the election to adopt the margin scheme but is a result of the transfers of Tower II and Tower III and the consideration agreed to be paid for them. We take the view that a development group, such as Raptis, which acquires land in respect of which no input tax credits are available, will always sell the developed product under the margin scheme if the end purchasers, such as those who purchased from Raptis, would not be able to enjoy any benefit of input tax credits. Accordingly, we consider that the margin scheme would have been applied to any sales of completed apartments in the development in any event. Thus the GST benefit arises not out of any election or choice but from the effect of the transfers of Tower II and Tower III."

66 As to the third argument advanced by Unit Trend, the insertion of sub-s (3) into s 165-5 in 2008 did not affect the meaning of (ie the causal connection required by) the phrase "not attributable to" in s 165-5(1)(b). In applying s 165-5, whether or not the case falls within s 165-5(1)(b) must be addressed before addressing s 165-5(3). It is only if the GST benefit is attributable to a statutory choice that one then addresses whether it was the purpose of the scheme to create the occasion for the exercise of that choice[47].

67 The insertion of s 165-5(3) in Div 165 cannot be regarded as an acknowledgement by the Parliament that, without it, Div 165 would not have encompassed a situation such as that of present concern. Section 165-5(3) ensures the application of Div 165 to the case where the scheme was entered into for the purpose of generating the statutory choice relied upon by the avoider. Section 165-5(1)(b) may apply without the need to invoke s 165-5(3) where the statutory choice arises as a step in a scheme. There may be cases where the avoider has not manipulated circumstances to confect the occasion for the

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46 *Unit Trend Services Pty Ltd v Commissioner of Taxation* [2010] AATA 497 at [110].

47 cf par 1.56 of the Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No 5) Bill 2008.

making of a statutory choice, but nevertheless the GST benefit can be seen to be not attributable to that choice. Having regard to the Tribunal's findings as to the terms of the scheme here in question, this is such a case. On those findings, which were not challenged on the appeal to the Full Court or in this Court, it is clear that s 165-5(3) was not necessary to bring this GST benefit within Div 165.

Conclusion and orders

68 The appeal should be allowed and the following orders made:

1. Special leave to appeal granted.

2. Appeal allowed.

3. Set aside orders 2, 7 and 8 of the orders of the Full Court of the Federal Court of Australia made on 5 October 2012 and, in their place, order that:

   (a) the issue of remission of penalty in relation to the declaration pursuant to s 165-40 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) be remitted to the Administrative Appeals Tribunal for further consideration;

   (b) Unit Trend Services Pty Ltd pay the Commissioner of Taxation's costs of, and incidental to, the appeal and cross-appeal in the Full Court; and

   (c) any monies paid into the Federal Court by Unit Trend Services Pty Ltd as security for costs be paid out of court to the Commissioner of Taxation together with accretions, if any.

4. Unit Trend Services Pty Ltd pay to the Commissioner of Taxation his costs of, and incidental to, the appeal.