HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, NETTLE AND GORDON JJ

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA APPELLANT

AND

SHARPCAN PTY LTD RESPONDENT

Commissioner of Taxation v Sharpcan Pty Ltd
[2019] HCA 36
Date of Hearing: 9 August 2019
Date of Judgment: 16 October 2019
M52/2019

ORDER

1. Appeal allowed.

2. Set aside order 1 of the Full Court of the Federal Court of Australia made on 27 September 2018 and in lieu thereof order that:

(a) the appeal to that Court be allowed;

(b) the decision of the Administrative Appeals Tribunal dated 14 December 2017 be set aside; and

(c) the appellant's objection decision be affirmed.

On appeal from the Federal Court of Australia

Representation

G J Davies QC with J E Jaques and L J S Molesworth for the appellant (instructed by Australian Government Solicitor)

D H Bloom QC and T P Murphy QC with D J McInerney and C M Horan for the respondent (instructed by Rigby Cooke Lawyers)

CATCHWORDS

Commissioner of Taxation v Sharpcan Pty Ltd

Income tax (Cth) – Allowable deductions – Where taxpayer had received percentage of income derived from 18 gaming machines operated by authorised gaming operator under *Gambling Regulation Act 2003* (Vic) at its hotel premises – Where *Gambling Regulation Act* amended to provide for gaming machine entitlements ("GMEs") to be allocated directly to gaming venue operators – Where taxpayer bid for and was allocated 18 GMEs permitting it to operate gaming machines at its premises for ten years – Where taxpayer paid purchase price by instalments – Whether purchase price was outgoing on revenue account deductible under s 8-1 of *Income Tax Assessment Act 1997* (Cth) ("1997 Act") – Whether purchase price was expenditure incurred to preserve (but not enhance) value of goodwill in relation to legal or equitable right with value to taxpayer solely attributable to effect on goodwill deductible under s 40-880 of 1997 Act.

Words and phrases – "asset of enduring value", "barrier to entry", "blackhole expenditure", "capital account", "capital asset", "CGT asset", "CGT cost base", "CGT event", "gaming machine entitlements", "goodwill", "motive", "objective purpose", "once-and-for-all outgoing", "practical and business point of view", "purchase price funded out of revenue", "revenue account", "statutory rights", "structural solution".

Gambling Regulation Act 2003 (Vic), Ch 3, Pt 4A.
Income Tax Assessment Act 1997 (Cth), ss 8-1, 40-880.

1 KIEFEL CJ, BELL, GAGELER, NETTLE AND GORDON JJ. This is an appeal from a decision of the Full Court of the Federal Court of Australia (Greenwood A-CJ, McKerracher J agreeing; Thawley J dissenting) that a sum of $600,300 paid by Spazor Pty Ltd ("the Trustee") to the State of Victoria for the allocation to the Trustee of 18 gaming machine entitlements ("GMEs") under the *Gambling Regulation Act 2003* (Vic) was an outgoing on revenue account and, as such, deductible under s 8-1 of the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act")[1]. The majority further held (Thawley J dissenting) that, if the outgoing were not so deductible, it would be deductible under s 40-880 of the 1997 Act as expenditure incurred to preserve but not enhance the value of goodwill in relation to a legal or equitable right of which the value to the Trustee was solely attributable to the effect that it had on goodwill[2].

2 For the reasons which follow, the appeal should be allowed. The amount of $600,300 which the Trustee paid for the acquisition of the GMEs was an outgoing on capital account, and thus not deductible under s 8-1 of the 1997 Act. Nor was it deductible under s 40-880 of the 1997 Act, because it was not incurred to preserve but not enhance the value of goodwill and the value of the GMEs to the Trustee was not solely attributable to the effect which they had on goodwill.

The facts

3 At all relevant times, the Trustee was the trustee of the Daylesford Royal Hotel Trust ("the Trust"), of which the respondent ("Sharpcan") was the sole beneficiary. On 8 August 2005, the Trustee, in its capacity as trustee of the Trust, purchased from Tattersall's Ltd ("Tattersall's") the business of the Royal Hotel in Daylesford at a price of $1,025,000. At the time of purchase, the hotel premises were a venue approved for gaming under the *Gambling Regulation Act*[3], and Tattersall's was the authorised gaming operator of 18 gaming machines that

---

1 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 165 [36]-[37], 196 [184].

2 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 207-208 [254], [256].

3 See *Gambling Regulation Act* (as at 18 June 2009), ss 1.3(1) (definition of "approved venue"), 3.2.1, 3.4.1.

Tattersall's owned and operated at the premises[4]. The Trustee did not purchase the gaming machines, but, in accordance with the terms of agreement under which it purchased the hotel business, between 8 August 2005 and 15 August 2012 Tattersall's continued to operate the 18 gaming machines at the premises and paid to the Trustee, as the new venue operator, a percentage of the income derived from the machines.

4 On 10 April 2008, the Victorian government announced that gaming operator licences issued to Tattersall's would not be renewed following their expiration in 2012 and that a new regulatory regime would be introduced in their place[5]. Thereafter, by the *Gambling Regulation Amendment (Licensing) Act 2009* (Vic), new gaming machine licensing provisions were enacted that provided for GMEs to be allocated directly to gaming venue operators – thus, in effect, cutting out Tattersall's[6]. Pursuant to that legislation, the Victorian government put up new GMEs for auction, and the Trustee bid for and was allocated 18 new GMEs for the sum of $600,300. Each of the new GMEs was of ten years' duration and permitted the Trustee to operate one gaming machine (a total of 18 gaming machines) at the premises for that period[7]. Subject to necessary approvals, the GMEs were capable of being sold and transferred to other venue operators for the operation of gaming machines at other premises[8].

---

4 See *Gambling Regulation Act* (as at 18 June 2009), ss 1.3(1) (definition of "gaming operator"), 3.4.2, 3.4.9; *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392 at 398 [31]-[32] per French CJ, Kiefel, Bell, Keane and Gordon JJ; 328 ALR 564 at 571.

5 See *Victoria v Tatts* (2016) 90 ALJR 392 at 399 [38] per French CJ, Kiefel, Bell, Keane and Gordon JJ; 328 ALR 564 at 572.

6 See *Gambling Regulation Act* (as at 1 January 2010), Ch 3, Pt 4A; *Victoria v Tatts* (2016) 90 ALJR 392 at 399-400 [39]-[41] per French CJ, Kiefel, Bell, Keane and Gordon JJ; 328 ALR 564 at 573.

7 See *Gambling Regulation Act* (as at 1 January 2010), ss 3.4A.1(1), 3.4A.2(1), 3.4A.5(4), 3.4A.7(1)(b).

8 See *Gambling Regulation Act* (as at 1 January 2010), s 3.4A.3, Ch 3, Pt 4A, Div 5.

5 In order to fund the purchase price of the GMEs, the Trustee entered into a related agreement with the Minister for Gaming[9], which provided for deferred payment of the remainder of the purchase price (after the $10,000 bond to participate in the auction was credited) by instalments between May 2010 and August 2016. The related agreement also provided that, if the Trustee defaulted in payment of an instalment, the number of GMEs proportionate to the total purchase price then outstanding could be forfeit[10]. The Trustee paid $50,030 in May 2010, $60,030 in August 2012, and $30,015 quarterly thereafter until August 2016.

6 Under the applicable provisions of the *Gambling Regulation Act*[11], the Trustee was required to ensure that the 18 machines were "approved gaming machines". To that end, the Trustee entered into a contract with PVS Australia Pty Ltd ("PVS"), which was authorised to provide approved gaming machines, and, by arrangement between PVS and Tattersall's, PVS approved the 18 machines already installed at the premises. The Trustee was also required to ensure that the gaming machines were monitored in accordance with the *Gambling Regulation Act*[12], and the Trustee engaged Intralot Gaming Services Pty Ltd to monitor the machines. The Trustee thereby operated the 18 machines on site and derived income therefrom until it sold the hotel business on 9 November 2015.

7 In its income tax return for the year of income ended 30 June 2012, the Trustee claimed the purchase price of the GMEs as a deduction under s 8-1 of the 1997 Act or, alternatively, one-fifth of the purchase price as a deduction under s 40-880 of the 1997 Act. The Commissioner of Taxation disallowed both claims ("the objection decision").

---

9 See *Gambling Regulation Act* (as at 1 January 2010), s 3.4A.6.

10 See *Gambling Regulation Act* (as at 1 January 2010), Ch 3, Pt 4A, Div 7.

11 See *Gambling Regulation Act* (as at 1 January 2010), ss 1.3(1) (definition of "approved gaming machine"), 3.4A.2, 3.5.1, 3.5.4.

12 See *Gambling Regulation Act* (as at 1 January 2010), ss 1.3(1) (definition of "electronic monitoring system"), 3.4.4, 3.5.13, 3.5.17A.

Relevant statutory provisions

8 So far as is relevant for present purposes, s 8-1 of the 1997 Act provides as follows:

> "(1) You can ***deduct*** from your assessable income any loss or outgoing to the extent that:
>
> (a) it is incurred in gaining or producing your assessable income; or
>
> (b) it is necessarily incurred in carrying on a *business for the purpose of gaining or producing your assessable income.
>
> ...
>
> (2) However, you cannot deduct a loss or outgoing under this section to the extent that:
>
> (a) it is a loss or outgoing of capital, or of a capital nature ..."

9 So far as is relevant for present purposes, s 40-880 of the 1997 Act provided at the relevant time that:

> "(1) The object of this section is to make certain *business capital expenditure deductible over 5 years if:
>
> (a) the expenditure is not otherwise taken into account; and
>
> (b) a deduction is not denied by some other provision; and
>
> (c) the business is, was or is proposed to be *carried on for a *taxable purpose.
>
> ...
>
> (2) You can deduct, in equal proportions over a period of 5 income years starting in the year in which you incur it, capital expenditure you incur:
>
> (a) in relation to your *business ...

(5) You cannot deduct anything under this section for an amount of expenditure you incur to the extent that:

...

(d) it is in relation to a lease or other legal or equitable right; or

...

(f) it could, apart from this section, be taken into account in working out the amount of a *capital gain or *capital loss from a *CGT event ...

(6) The exceptions in paragraphs (5)(d) and (f) do not apply to expenditure you incur to preserve (but not enhance) the value of goodwill if the expenditure you incur is in relation to a legal or equitable right and the value to you of the right is solely attributable to the effect that the right has on goodwill."

Proceedings before the AAT

10 Sharpcan applied to the Administrative Appeals Tribunal ("the AAT") for review of the objection decision. The AAT, constituted by Pagone J sitting as Deputy President of the AAT, set aside the objection decision on the basis that the amount paid for the GMEs was allowable as a deduction in respect of the 2010 year of income under s 8-1 of the 1997 Act. Pagone J reasoned[13] that, although "[s]ome features of [the GMEs] may be thought to be of capital or of a capital nature", "[t]he character of the outgoing ... must be answered by considering what the expenditure was effected to calculate for the business of the trustee from a practical and business point of view" and that "[t]he outgoing for the [GMEs] in the trustee's business is more like a fee paid for the regular conduct of a business than the acquisition of a permanent or enduring asset". In his Honour's view[14]:

---

13 *Re Sharpcan Pty Ltd and Federal Commissioner of Taxation* (2017) 107 ATR 176 at 181 [10], 182-183 [12], [13].

14 *Re Sharpcan Pty Ltd and Federal Commissioner of Taxation* (2017) 107 ATR 176 at 184 [14].

> "The outgoings were for the statutory entitlement to conduct gaming at its premises on gaming machines over time, and the amount of the bid reflected the expected income stream from the use of those other assets which the [GMEs] permitted. An incident of acquiring the [GMEs] by the outgoing may have been to have preserved the trustee's income earning structure, but the purpose of the outgoing was to obtain the right to conduct gaming to enable the trustee to derive the future income which was expected from the gaming."

Proceedings before the Full Court

11 The Commissioner appealed to the Full Court, which, by majority, dismissed the appeal. The majority accepted[15] that there were factors which suggested that the outgoing was in the nature of a capital outgoing. The factors identified in the Commissioner's submission[16] were:

(1) that the GMEs were intangible assets created pursuant to statute;

(2) that the GMEs could be bought and sold;

(3) that the GMEs conferred on the Trustee a statutory authority necessary lawfully to conduct gaming on gaming machines;

(4) that the GMEs were of ten years' duration (subject to a liability to forfeiture for breach of the operating conditions);

(5) that the price which the Trustee paid for the GMEs was set at auction and, despite the deferred payment agreement, was properly characterised as a lump sum;

(6) that the price was payable irrespective of the fortunes of the business;

---

15 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 188 [137]-[139].

16 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 178 [79]-[88].

(7) that the fundamental change in the arrangements involved the Trustee conducting gaming and becoming entitled to the whole of the income generated from the gaming activities for the entire period of ten years; and

(8) that the Trustee became responsible for outgoings for the supply, maintenance and monitoring of gaming machines and the payment of taxes in respect of gaming.

12 The majority stated[17], however, that there were in effect four factors which, taken together, led to the conclusion that the outgoing was on revenue account. They were:

(1) that the outgoing had "to be recouped out of, in effect, every day's trading across all facets of the integrated business and especially out of gaming revenues";

(2) that the outgoing reflected "the economic value of the income stream expected from putting other assets to use to derive income" from gaming;

(3) that the outgoing was "incurred in relation to a business properly understood as an integrated hotel business characterised by the various trading activities [being the sale of drinks, meals and accommodation], including gaming, conducted by the Trustee", which "the Commissioner ha[d], quite artificially, looked *through* and *beyond*" to "*excise*[] ... that part of it which relate[d] to gaming"; and

(4) that "[t]he Trustee was confronted with the changed circumstances brought about by government intervention and had to respond to the possible loss of the right to derive revenue from gaming activities", and "[i]f the Trustee [had] not bid for, and [won] the bidding for, 18 GMEs ... it would not have any income from gaming from 16 August 2012" and "the business of the integrated hotel undertaking would have been significantly at risk".

---

17 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 191 [154], 195 [176], 196 [185]-[186], 197 [190], 216 [290] (emphasis in original).

13 Although expressing[18] some reservation as to the value of analogies to decided cases, the majority equated[19] the purchase price of the GMEs to amounts paid by BP Australia Ltd to service station proprietors to secure solo-site tying arrangements. In *BP Australia Ltd v Federal Commissioner of Taxation*, the Privy Council held[20] that those payments were deductible under s 51(1) of the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) as amounts payable out of "circulating capital" which "had to come back penny by penny with every order during the period in order to reimburse and justify the particular outlay".

14 In the alternative, the majority reasoned[21] that, if the purchase price were an outgoing on capital account, it would be deductible under s 40-880 of the 1997 Act because, they said, the purpose of the expenditure from a practical and business point of view was to preserve the goodwill of the hotel business and the value to the Trustee of the GMEs was solely attributable to the effect that they had on the goodwill of the business, which would have been significantly diminished without them.

15 Thawley J, in dissent, would have allowed the appeal[22]. His Honour concluded[23] that the GMEs were a capital asset of enduring value acquired as a

---

18 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 179 [92], citing *Federal Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 228 CLR 1 at 43 [151] per Crennan J and *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 at 661 [64] per Gaudron, Gummow, Kirby and Hayne JJ.

19 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 191-194 [155]-[169].

20 (1965) 112 CLR 386 at 398 per Lord Pearce for the Board; [1966] AC 224 at 265-266.

21 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 206 [245], 207-208 [254].

22 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 227 [344].

23 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 214 [284], 215 [286].

"means of production", being "capital assets necessary for it to conduct gaming activities". His Honour observed[24] that it was "not to the point that changes in the law were the reason why the Trustee formed a desire to acquire those assets, or formed the view that it was commercially necessary for those assets to be acquired". Thawley J did not accept that the outgoing reflected "the economic value of the income stream expected from putting other assets to use to derive income from gaming", and said[25] that, "even if it had, that would not have been a basis for concluding that the expenditure was on revenue account". Nor did his Honour accept that the purchase price was analogous to the amounts paid by BP Australia to secure tying arrangements. As he explained[26]:

> "The practical commercial requirement to acquire the GMEs was a one-off expenditure which would secure for the Trustee the ability to conduct gaming for a period of 10 years. This was a significant, one-off, structural change to the way the business operated. It was not expenditure which would need to be repeated over and again as a necessity of trade comparable to the need on the part of BP [Australia] to secure trade ties with numerous petrol retailers."

16 Thawley J also rejected the claim to deduct part of the purchase price of the GMEs under s 40-880 of the 1997 Act. His Honour denied[27] that the GMEs were acquired "to preserve (but not enhance) the value of goodwill". In his Honour's view[28], the evidence demonstrated "that the purpose of the expenditure was to acquire GMEs at the lowest possible price ... to enable the Trustee lawfully to commence conducting gaming activities and derive income (greater

---

24 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 215 [286].

25 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 216 [291].

26 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 218 [299].

27 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 227 [341].

28 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 224 [329], 227 [341].

over the full term than had previously been derived) through the exercise of the rights ... for 10 years absent a sale of the rights to an incoming purchaser", rather than "to preserve (but not enhance) the value of goodwill". His Honour also denied[29] that the value of the GMEs to the Trustee was "solely attributable" to the effect that they had on "goodwill". He held[30] that they "had a value distinct from any effect [they] had on goodwill", which inhered in the fact that they were "a valuable asset capable of transfer" which "resulted in a taxable income stream" different from, and likely to be significantly more profitable than, that which had previously been earned.

The purchase price was an outgoing of capital

17 Thawley J was correct that the GMEs were a capital asset of enduring value acquired by the Trustee as the means of production necessary for the Trustee to conduct gaming activities in the period following expiration of the Trustee's arrangements with Tattersall's. It was not to the point that the Trustee intended to recoup the purchase price of the GMEs over time out of every day's trading. It was not to the point that the purchase price of the GMEs may have reflected the economic value of the income stream expected to be derived from gaming. It was not to the point that the Trustee's hotel business was an integrated business which would have been significantly prejudiced and possibly failed if the Trustee had not purchased the GMEs. And it was not to the point that the reason the Trustee determined to acquire the GMEs was the change in the law that made it necessary for a venue operator to own GMEs rather than dealing through Tattersall's. The Trustee's purpose in paying the purchase price of the GMEs was to acquire, hold and deploy the GMEs as enduring assets of the hotel business for the purpose of generating income from gaming. There can be no question that the purchase price was incurred on capital account.

18 Authority is clear that the test of whether an outgoing is incurred on revenue account or capital account primarily depends on what the outgoing is

---

29 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 227 [343].

30 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 227 [343].

calculated to effect from a practical and business point of view[31]. Identification of the advantage sought to be obtained ordinarily involves consideration of the manner in which it is to be used and whether the means of acquisition is a once-and-for-all outgoing for the acquisition of something of enduring advantage or a periodical outlay to cover the use and enjoyment of something for periods commensurate with those payments[32]. Once identified, the advantage is to be

---

31 *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 at 648 per Dixon J (McTiernan J agreeing at 652). See *BP Australia* (1965) 112 CLR 386 at 397 per Lord Pearce for the Board; [1966] AC 224 at 264; *Federal Commissioner of Taxation v South Australian Battery Makers Pty Ltd* (1978) 140 CLR 645 at 659 per Gibbs A-CJ, 661-662 per Stephen and Aickin JJ, 667-668 per Jacobs J, 672 per Murphy J; *Cliffs International Inc v Federal Commissioner of Taxation* (1979) 142 CLR 140 at 152 per Gibbs J, 158 per Stephen J, 171-172 per Jacobs J, 176 per Murphy J; *Citylink* (2006) 228 CLR 1 at 14 [25] per Kirby J, 43 [148] per Crennan J (Gleeson CJ, Gummow, Callinan and Heydon JJ agreeing at 8 [1]-[2], 27 [76]-[77]); *AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation* (2015) 255 CLR 439 at 455 [22] per French CJ, Kiefel and Bell JJ, 474 [73]-[74] per Gageler J, 496 [140] per Nettle J. See also *Strick (Inspector of Taxes) v Regent Oil Co Ltd* [1966] AC 295 at 348 per Lord Wilberforce.

32 *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337 at 363 per Dixon J (McTiernan J agreeing at 365). See *Broken Hill Theatres Pty Ltd v Federal Commissioner of Taxation* (1952) 85 CLR 423 at 433-434 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *BP Australia* (1965) 112 CLR 386 at 394 per Lord Pearce for the Board; [1966] AC 224 at 261; *South Australian Battery Makers* (1978) 140 CLR 645 at 654-655 per Gibbs A-CJ (Stephen and Aickin JJ agreeing at 661); *Cliffs International* (1979) 142 CLR 140 at 153-154 per Gibbs J, 164 per Stephen J, 173 per Jacobs J; *Avco Financial Services Ltd v Federal Commissioner of Taxation* (1982) 150 CLR 510 at 518 per Gibbs CJ; *GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation* (1990) 170 CLR 124 at 137 per Brennan, Dawson, Toohey, Gaudron and McHugh JJ; *Mount Isa Mines Ltd v Federal Commissioner of Taxation* (1992) 176 CLR 141 at 147-148 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Citylink* (2006) 228 CLR 1 at 14 [24] per Kirby J, 43 [147] per Crennan J (Gleeson CJ, Gummow, Callinan and Heydon JJ agreeing at 8 [1]-[2], 27 [76]-[77]); *AusNet Transmission* (2015) 255 CLR 439 at 454-455 [22] per French CJ, Kiefel and Bell JJ.

characterised by reference to the distinction between the acquisition of the means of production and the use of them; between establishing or extending a business organisation and carrying on the business; between the implements employed in work and the regular performance of the work in which they are employed; and between an enterprise itself and the sustained effort of those engaged in it[33]. Thus, an indicator that an outgoing is incurred on capital account is that what it secures is necessary for the structure of the business[34].

19 The GMEs were assets of enduring value authorising the holder to conduct gaming activities[35]. When the Trustee's arrangements with Tattersall's expired, the Trustee purchased the GMEs as assets of enduring value to replace the extinguished arrangements and thereby provide itself with the means of continuing to operate the gaming aspect of the hotel business for the next ten years. The GMEs were necessary for the structure of the business because the conduct of gaming in an approved venue is only lawful if the venue operator holds a GME. The GMEs were a barrier to entry[36]. The purchase price was paid in several instalments, but it was in the nature of a once-and-for-all outgoing for the acquisition of an enduring asset. This was not a case of regular and recurrent payments for the use of an asset.

---

33 *Hallstroms* (1946) 72 CLR 634 at 647 per Dixon J (McTiernan J agreeing at 652). See *Sun Newspapers* (1938) 61 CLR 337 at 359 per Dixon J (McTiernan J agreeing at 365); *BP Australia* (1965) 112 CLR 386 at 404 per Lord Pearce for the Board; [1966] AC 224 at 271; *South Australian Battery Makers* (1978) 140 CLR 645 at 661 per Stephen and Aickin JJ; *Mount Isa Mines* (1992) 176 CLR 141 at 147 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *AusNet Transmission* (2015) 255 CLR 439 at 474 [73] per Gageler J. See also *Strick (Inspector of Taxes) v Regent Oil Co Ltd* [1966] AC 295 at 329 per Lord Morris of Borth-y-Gest.

34 *AusNet Transmission* (2015) 255 CLR 439 at 472 [66] per French CJ, Kiefel and Bell JJ.

35 See *British Insulated and Helsby Cables Ltd v Atherton* [1926] AC 205 at 213-214 per Viscount Cave LC.

36 *Gambling Regulation Act* (as at 1 January 2010), s 3.4A.1(1)(a).

Assets of enduring advantage

20 Counsel for Sharpcan submitted that, although the GMEs were of nominally ten years' duration, the purchase price was incurred on revenue account because the acquisition of the GMEs did not amount to the acquisition of "permanent rights" or, alternatively, because the rights conferred by the GMEs were in the nature of statutory licences subject to forfeiture in the event of failure to comply with their conditions and the possibility of statutory amendment. Counsel invoked the decisions of this Court in *Federal Commissioner of Taxation v Citylink Melbourne Ltd*[37] and *ICM Agriculture Pty Ltd v The Commonwealth*[38] in support of those submissions.

21 Those submissions should be rejected. *Citylink* provides no support for the idea that the acquisition of the GMEs was not the acquisition of an asset of enduring advantage. As the majority in *Citylink* noted[39], the concession agreement there in issue was essentially a licence agreement "to *use* capital assets for the limited period of the concession". It followed, as the majority held[40], that concession fees under the agreement, which were payable semi-annually and calculated in part on the basis of revenue generated[41], were "periodic licence fees" for such use. They were not the purchase price for the *acquisition* of any enduring advantage, because the agreement did not confer any "permanent ownership rights" over the roads and lands which were the subject of the concession[42]. Although the concession agreement was of 30 years' duration, that

---

37 (2006) 228 CLR 1.

38 (2009) 240 CLR 140.

39 (2006) 228 CLR 1 at 42 [143] per Crennan J (Gleeson CJ, Gummow, Callinan and Heydon JJ agreeing at 8 [1]-[2], 27 [76]-[77]) (emphasis added).

40 *Citylink* (2006) 228 CLR 1 at 44 [154] per Crennan J (Gleeson CJ, Gummow, Callinan and Heydon JJ agreeing at 8 [1]-[2], 27 [76]-[77]).

41 See *Citylink* (2006) 228 CLR 1 at 32-33 [102]-[103], [106], 41-42 [141]-[142] per Crennan J (Gleeson CJ, Gummow, Callinan and Heydon JJ agreeing at 8 [1]-[2], 27 [76]-[77]).

42 *Citylink* (2006) 228 CLR 1 at 44 [154] per Crennan J (Gleeson CJ, Gummow, Callinan and Heydon JJ agreeing at 8 [1]-[2], 27 [76]-[77]).

fact did not alter the character of the advantage sought by the fees payable under it.

22 By contrast, as Thawley J observed[43], the payments in respect of the GMEs were not in any sense in the nature of periodic licence fees. They were merely instalments of the purchase price "for" the GMEs, which was payable once and for all upon the acquisition of the GMEs regardless of the amount of revenue which the GMEs might or might not generate.

23 *ICM* provides no support for Sharpcan's argument either. In that case, it was held that statutory ground and surface water licences issued under the *Water Act 1912* (NSW) were a species of property but that their cancellation by statute and replacement with new statutory licences which did not permit the licence holders to take as much water as was previously allowed was not an "acquisition of property" within the meaning of s 51(xxxi) of the *Constitution*: either because the water was a natural resource over which the State had always had power to limit use[44]; or because the State acquired no identifiable or measurable advantage by cancellation of the original licences[45]. Hayne, Kiefel and Bell JJ observed[46] that one reason among others for the latter conclusion was that, because the original licences were statutory licences, they were inherently susceptible to change or termination.

24 Counsel for Sharpcan argued that, since the GMEs were statutory rights, they were likewise inherently susceptible to change or termination and so could not be regarded as assets of enduring advantage. That is not so. The fact that the defeasance of one form of inherently defeasible statutory right does not amount to the "acquisition of property" within the meaning of s 51(xxxi) of the *Constitution* provides little, if any, guidance as to whether the acquisition by a taxpayer of another form of inherently defeasible statutory right amounts to the acquisition by the taxpayer of an asset of sufficient permanence or enduring

---

43 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 213-214 [280]-[281].

44 *ICM* (2009) 240 CLR 140 at 180 [84] per French CJ, Gummow and Crennan JJ.

45 *ICM* (2009) 240 CLR 140 at 201-202 [147] per Hayne, Kiefel and Bell JJ.

46 *ICM* (2009) 240 CLR 140 at 200 [144].

advantage to be regarded as having been acquired on capital account. As Latham CJ stated in *Sun Newspapers Ltd v Federal Commissioner of Taxation*[47]:

> "When the words 'permanent' or 'enduring' are used in this connection it is not meant that the advantage which will be obtained will last forever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole".

25 Here, the purchase price of the GMEs was not recurrent expenditure but expenditure made once and for all with a view to bringing into existence an advantage of enduring benefit to the Trustee's mixed hotel business: the ability, albeit subject to some risk of earlier termination, lawfully to operate 18 gaming machines on the premises for up to ten years following cessation of the arrangements with Tattersall's.

Purchase price funded out of revenue

26 The majority in the Full Court attributed[48] significance to the fact, as they found it to be, that the Trustee purchased the GMEs with the intention that the purchase price should be funded out of receipts of gaming income derived from the operation of the GMEs. As Thawley J observed[49], however, the evidence did not go so far; and, even if it had, the existence of such an intention would only serve to confirm that the Trustee expected the GMEs to generate income over a substantial period of time and thus be of enduring advantage to the business. The nature of a once-and-for-all outgoing for the acquisition of an asset is determined by the character of the advantage sought to be achieved by its acquisition, not by the source of funds with which it is purchased[50]. The relevant distinction is

---

47 (1938) 61 CLR 337 at 355, citing *Anglo-Persian Oil Co Ltd v Dale* (1932) 145 LT 529 at 532 per Rowlatt J.

48 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 189-190 [145]-[146].

49 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 217 [294]-[295].

50 See *Colonial Mutual Life Assurance Society Ltd v Federal Commissioner of Taxation* (1953) 89 CLR 428 at 454 per Fullagar J (Kitto and Taylor JJ agreeing at

Footnote continues

between a once-and-for-all outgoing for the acquisition of something of enduring advantage and a periodical outlay to cover the use and enjoyment of something for periods commensurate with those payments. The intended source of funding did not imply that the purchase price of the GMEs was not a once-and-for-all outgoing for the acquisition of something of enduring advantage.

Economic value of income stream

27 The majority in the Full Court considered[51] it to be significant that the Trustee calculated the maximum amount which it was prepared to bid for the GMEs on the basis of a projection of what the GMEs were likely to return over the course of their ten-year term. Once again, however, as Thawley J observed[52], the evidence did not go so far; and, even if it had, it would not have been significant. Proper analysis of what the acquisition of the GMEs was calculated to effect from a practical and business point of view required taking account of the legal rights and obligations thereby created and their expected consequences for the Trustee's business[53]. Regardless of the considerations informing the amount that the Trustee was willing to pay for the GMEs, the purchase price for the GMEs was a lump sum paid for the acquisition of the GMEs which was payable regardless of the amount of income that might be earned from them[54].

---

460); *GP International* (1990) 170 CLR 124 at 137 per Brennan, Dawson, Toohey, Gaudron and McHugh JJ.

51 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 189-190 [146]-[149].

52 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 216 [291].

53 See *South Australian Battery Makers* (1978) 140 CLR 645 at 662 per Stephen and Aickin JJ; *GP International* (1990) 170 CLR 124 at 137 per Brennan, Dawson, Toohey, Gaudron and McHugh JJ; *AusNet Transmission* (2015) 255 CLR 439 at 455 [22] per French CJ, Kiefel and Bell JJ, 474 [74] per Gageler J.

54 See *Inland Revenue Commissioners v Adam* 1928 SC 738 at 743 per Lord Clyde.

28 The majority in the Full Court were of the view[55] that, because the maximum amount that the Trustee was prepared to pay for the GMEs was calculated by reference to the income which the Trustee estimated the GMEs would return over their ten-year lifetime, the lump sum purchase price of the GMEs was in effect equivalent to a stream of regular and recurrent payments over the lifetime of the GMEs for the use of them throughout that period, and, therefore, was incurred on revenue account.

29 That reasoning was misplaced. Presumably, most rational business operators would not contemplate the acquisition of a capital asset unless the present discounted value of the stream of income which it is expected to generate over its lifetime is at least as much as its purchase price[56]. But there is nothing in principle or authority which supports the idea that that is a basis to treat the acquisition of a capital asset as if it were acquired on revenue account. Admittedly, in *BP Australia*, in a passage of the judgment which the majority in the Full Court emphasised[57], Lord Pearce stated[58] that:

> "The test of whether these sums were payable out of fixed or circulating capital, referred to for example in *John Smith & Son v Moore*[59] tends in the present case in favour of regarding these payments as revenue expenditure. ... The sums in question were sums which had to come back penny by penny with every order during the period in order to reimburse and justify the particular outlay."

If taken at face value, however, those propositions are problematic.

---

55 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 190 [147].

56 For early recognition of this fact, see Wellington, *The Economic Theory of the Location of Railways: An Analysis of the Conditions Controlling the Laying out of Railways to Effect the Most Judicious Expenditure of Capital*, rev ed (1887), ch 4.

57 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 191 [154].

58 (1965) 112 CLR 386 at 398; [1966] AC 224 at 265-266.

59 [1921] 2 AC 13 at 19 per Viscount Haldane.

30 In *John Smith*, Viscount Haldane referred[60] to the distinction between fixed capital and circulating capital as corresponding to the distinction which Adam Smith first drew between what the owner of a business turns to profit by keeping in his own possession and what he makes profit of by parting with and letting change masters[61]. Thus, his Lordship held that long-term contracts for the purchase of coal at favourable discounted prices were fixed capital – not part of circulating capital – on the basis that the taxpayer did not profit by selling the contracts but rather by retaining the contracts and employing his circulating capital in buying coal under them for sale at a profit[62]. If anything, *John Smith* tends to imply that the amounts outlaid by BP Australia were outgoings incurred in the acquisition of capital assets, not that they were revenue outgoings.

31 Lord Pearce's dictum may be understood as emphasising that the amounts paid by BP Australia were revenue outgoings (for reasons discussed below), and thus to be accounted against incoming revenue. But it should not be understood as asserting that those amounts were on revenue account merely because BP Australia could, did or even had to amortise them over the cost of each gallon of petrol sold. A taxpayer's acknowledgment that a capital outlay can be expressed in terms of an economically equivalent projected stream of income payments does not convert the capital outlay into a revenue outgoing.

Obstacle to integrated business

32 The majority in the Full Court considered[63] it to be significant that the purchase price of the GMEs was "incurred in relation to a business properly understood as an integrated hotel business" and referred to the Commissioner as having artificially looked "*through* and *beyond* the integrated undertaking of the hotel business and *excised* from it that part of it which relate[d] to gaming". Likewise, in submissions before this Court, counsel for Sharpcan emphasised that the Trustee's purchase of the GMEs was not the purchase of a new business,

---

60 [1921] 2 AC 13 at 19-20.

61 See Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 5th ed (1789), vol 1, bk 2, ch 1.

62 *John Smith* [1921] 2 AC 13 at 20 per Viscount Haldane.

63 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 196 [185].

or the addition of a new and distinct aspect of business, but rather a means of dealing with an obstacle to continued trade the result of the change in legislation. Counsel submitted that the outgoing was for that reason incurred on revenue account, and invoked the decisions of this Court in *Hallstroms Pty Ltd v Federal Commissioner of Taxation*[64] and *Federal Commissioner of Taxation v Snowden & Willson Pty Ltd*[65], the decision of the Federal Court in *Magna Alloys and Research Pty Ltd v Federal Commissioner of Taxation*[66], and the decision of the Privy Council in *BP Australia* in support of those submissions.

33 Those submissions must be rejected. As has been observed[67], the determination of whether an outgoing is incurred on capital account or revenue account depends on the nature and purpose of the outgoing: specifically, whether the outgoing is calculated to effect the acquisition of an enduring advantage to the business. And the identification of what (if anything) is to be acquired by an outgoing ultimately requires a counterfactual, not an historical, analysis: specifically, a comparison of the expected structure of the business after the outgoing with the expected structure *but for* the outgoing, not with the structure *before* the outgoing. Other things being equal, it makes no difference whether the outlay has the effect of expanding the business or simply maintaining it at its present level[68]. If a once-and-for-all payment is made for the acquisition of an asset of enduring advantage which, once acquired, forms part of the profit-earning structure of the business, the payment is incurred on capital account.

34 To illustrate the point with an example suggested by counsel for the Commissioner, if a tradesperson's delivery van reaches the end of its working life, it may be necessary for the tradesperson to purchase a new delivery van in order to continue to carry on business as he or she has done up to that point. But the purchase price of the new van is not a revenue outgoing. It is the acquisition

---

64 (1946) 72 CLR 634.

65 (1958) 99 CLR 431.

66 (1980) 33 ALR 213.

67 See [18] above.

68 See *John Fairfax & Sons Pty Ltd v Federal Commissioner of Taxation* (1959) 101 CLR 30 at 40-42 per Fullagar J. Contra *Southern v Borax Consolidated Ltd* [1941] 1 KB 111 at 116-117 per Lawrence J.

of an asset of enduring advantage which is incurred on capital account. And the same applies to the Trustee's purchase of the GMEs. It was necessary for the Trustee to purchase the GMEs in order to continue to carry on its business as it had done up to that point. But the purchase price was a once-and-for-all payment for the acquisition of an asset of enduring advantage – the 18 GMEs – which once acquired formed part of the profit-earning structure of the Trustee's business. It was incurred on capital account.

35 Nor do any of the decisions on which counsel relied suggest otherwise. In *Hallstroms*[69], a majority of this Court held that legal costs and expenses incurred in opposing the extension of a competitor's patent were deductible because they did not result in the taxpayer's acquisition of an asset of enduring advantage. The majority reasoned[70] that the expenditure merely avoided a diminution in the taxpayer's business, not the extinguishment of that business or any substantial alteration to its structure[71]. In dissent, Dixon J reasoned[72] that, although the cost of acquisition of an asset of enduring advantage as part of the profit-earning structure of a business is a capital outlay, it is not the case that an outlay which does not result in an alteration in fixed capital assets may not be a capital outlay, and that, as the outlay in resisting the patent extension had been incurred to enable the taxpayer "to place its business on a fresh foundation" by turning over to production of refrigerators according to the patented invention, it concerned "the reform of or the more effective establishment of the organization" by which income would be produced and was, therefore, an outgoing of a capital nature. In effect, however, all members of the Court acknowledged that an outgoing to avoid substantial alteration to the structure of a business may be incurred on capital account.

36 In *Snowden & Willson*, money expended by a speculative builder on advertising and in appearing before a Royal Commission into complaints against the builder's business practices was held to be deductible as incurred on revenue account because the expenditure was not to prevent the winding up of the builder

---

69 (1946) 72 CLR 634.

70 *Hallstroms* (1946) 72 CLR 634 at 642 per Latham CJ, 645 per Starke J, 654 per Williams J.

71 cf *Ward & Co Ltd v Commissioner of Taxes* [1923] AC 145.

72 *Hallstroms* (1946) 72 CLR 634 at 649-651 (McTiernan J agreeing at 652).

or a stoppage of its business but simply to counter the effect of the allegations and thereby prevent those persons who had made the allegations escaping obligations to pay the builder under existing contracts[73]. There is no suggestion in *Snowden & Willson* that the costs of acquisition of an asset of enduring advantage as an accretion to the profit-earning structure of the business are incurred otherwise than on capital account.

37 *Magna Alloys* was to similar effect. In that matter, legal costs incurred to defend directors of the corporate taxpayer in criminal proceedings associated with marketing methods employed to sell the taxpayer's products were held to be deductible because the interests of the taxpayer were inextricably involved with those of its directors and it was plainly in the taxpayer's own interests that the directors were properly represented. Brennan J reasoned[74] that the expenditure was properly to be regarded as a cost on revenue account because it was incurred in attempting to vindicate the day-to-day business methods of the taxpayer and thus in overcoming the obstacle to its trading which had been raised by the proceedings. Deane and Fisher JJ reasoned[75] that the proceedings in respect of which the expenditure was incurred did not imperil the company except in the most indirect way and that it did not involve the acquisition of any enduring or tangible asset.

38 *BP Australia* is more complex. As has been seen, in that case the Privy Council held that the payments made by BP Australia to petrol retailers to secure each retailer's agreement to stock only BP Australia products and to make reasonable endeavours to promote retail sales of BP Australia products were incurred on revenue account. And as has been observed, some of their Lordships' observations are problematic. In substance, however, the main thrust of their reasoning relied on the following considerations:

---

73 (1958) 99 CLR 431 at 437 per Dixon CJ, 445-446 per Fullagar J (Williams J agreeing at 437), 451-452 per Taylor J.

74 *Magna Alloys* (1980) 33 ALR 213 at 228-229.

75 *Magna Alloys* (1980) 33 ALR 213 at 239.

(1) that the tying arrangements were not of such duration as to indicate that the ties were a structural solution[76];

(2) that the payments were made to particular customers to secure their particular custom[77];

(3) that the benefit of each payment to BP Australia was to be used in the continuous and recurrent struggle to get orders and sell petrol[78];

(4) that, although not strictly "bundles of orders", the agreements were the basis of orders and made orders inevitable[79]; and

(5) that, for a durable company operating in the wholesale petroleum market after the rapid change from multi-brand franchises to solo-brand sites, the payments were essentially recurrent[80].

39 In the result, *BP Australia* is perhaps best understood as a decision that, where an oil company paid particular customers on a recurrent basis to induce those customers to buy quantities of a product which the oil company sought to sell to those customers on a recurrent basis, the payments were an expense incurred on revenue account in gaining or producing sales and, therefore, deductible.

---

76 *BP Australia* (1965) 112 CLR 386 at 399-400 per Lord Pearce for the Board; [1966] AC 224 at 267; cf *Strick (Inspector of Taxes) v Regent Oil Co Ltd* [1966] AC 295, decided on the same day by the House of Lords constituted by the same Law Lords.

77 *BP Australia* (1965) 112 CLR 386 at 402-403 per Lord Pearce for the Board; [1966] AC 224 at 270. See and compare Parsons, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (1985) at 438-439 [7.36].

78 *BP Australia* (1965) 112 CLR 386 at 405 per Lord Pearce for the Board; [1966] AC 224 at 273.

79 *BP Australia* (1965) 112 CLR 386 at 405 per Lord Pearce for the Board; [1966] AC 224 at 273.

80 *BP Australia* (1965) 112 CLR 386 at 405-406 per Lord Pearce for the Board; [1966] AC 224 at 273-274.

40 By contrast, here, the GMEs were a structural solution. The purchase price was not paid to particular customers to secure their particular custom: it was paid to a third party – the State of Victoria – for the acquisition of entitlements of ten years' duration lawfully to operate gaming machines on the Trustee's hotel premises. The benefit to the Trustee of purchasing the GMEs was not in any sense analogous to "bundles of orders" from customers seeking to play the gaming machines. The benefit to the Trustee of purchasing the GMEs was the acquisition of an enduring asset as part of the profit-earning structure of the Trustee's business from which to derive gaming income. In relevant respects, the acquisition of the GMEs was not dissimilar to the acquisition of the hotel licence in *Henriksen v Grafton Hotel Ltd*[81], which was held to be an acquisition on capital account.

No commercial choice

41 Finally on this aspect of the matter, the majority in the Full Court emphasised[82] that the impending statutory regime presented a major threat to the revenues, profitability and goodwill of the hotel unless the GMEs were acquired and thereby deprived the Trustee of any commercial choice other than to bid successfully for the GMEs. As it appears, the majority equated that to the circumstance in *BP Australia* that BP Australia's entry into the solo-site agreements under which it made payments to petrol retailers was in effect foisted on it by the actions of its competitors entering into similar agreements with other retailers and thus leaving it with no choice but to do likewise[83]. The majority in the Full Court appear to have reasoned that the fact the purchase of the GMEs was foisted on the Trustee (just as the need to enter into tying arrangements was foisted on BP Australia) meant or contributed to the conclusion that the purchase price of the GMEs was incurred on revenue account.

42 If so, that reasoning was misplaced. The determination of whether a taxpayer acquires an asset on capital account or revenue account is not affected by whether the taxpayer's assessment of the need to acquire the asset is foisted on the taxpayer. Nor is it the case that the determination of whether expenditure is

---

81 [1942] 2 KB 184.

82 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 164-165 [32]-[34], 194 [169], 197 [191].

83 See *BP Australia* (1965) 112 CLR 386 at 387-388; [1966] AC 224 at 228-229.

incurred on capital account or revenue account depends on whether, but for acquisition of the asset, the taxpayer might have suffered a substantial reduction in income or be unable to continue in business. As has been explained[84], it depends on whether the asset is acquired as part of fixed capital – as part of the profit-earning structure of the business – or as part of working capital to be used up in the course of the regular and recurrent operation of the profit-earning structure of the business. As Thawley J concluded, the GMEs were a capital asset of enduring value acquired as "means of production" to put the Trustee in a position where it owned the capital assets necessary for it to conduct gaming activities.

Section 40-880(2) did not apply

43 As is apparent from the text and context of s 40-880(6), its purpose is to allow a deduction for capital expenditure which is incurred to preserve goodwill by acquiring a legal or equitable right that has no value to the taxpayer independent of its effect on goodwill, and which could not otherwise be brought to account under the Act. That is confirmed by the history of the provision and the Explanatory Memorandum to the Bill[85] enacted as the *Tax Laws Amendment (2006 Measures No 1) Act 2006* (Cth) ("the amending Act"), by which the provision was introduced into the 1997 Act.

44 Goodwill is a CGT asset[86], and therefore expenditure incurred in the acquisition of goodwill may be brought to account in the first element of the CGT cost base of that asset at the time of a CGT event[87]. Before the enactment of the amending Act, expenditure in relation to goodwill other than the purchase of goodwill could be brought to account in the fourth element of the CGT cost base[88]:

---

84 See [33] above.

85 Australia, House of Representatives, *Tax Laws Amendment (2006 Measures No 1) Bill 2006*, Explanatory Memorandum at 55 [2.70]-[2.71].

86 1997 Act (as at 9 June 2010), s 108-5(2)(b).

87 See 1997 Act (as at 9 June 2010), s 110-25(1), (2).

88 1997 Act (as at 5 April 2006), s 110-25(5).

> "The fourth element is capital expenditure you incurred to increase the [CGT] asset's value. However, the expenditure must be reflected in the state or nature of the asset at the time of the *CGT event."

45 As enacted in 2001, s 40-880(1) permitted a taxpayer to deduct certain identified capital expenditure that could not be taken into account in working out the amount of a capital gain or capital loss from a CGT event. Since expenditure to increase the value of goodwill could be taken into account in the fourth element of the CGT cost base, s 40-880(1) did not apply to such expenditure.

46 The amending Act abolished the ability to include expenditure in relation to goodwill in the fourth element of the CGT cost base[89] and created a new deduction under s 40-880(2) in effect to preserve the deductibility of such expenditure. In order to achieve that result, s 40-880(6) was included to prevent the exclusions in s 40-880(5)(d) and (f) applying to such expenditure. Further, s 40-880 is a provision of last resort[90]. It targets "blackhole expenditure", namely business expenses incurred by taxpayers that fall outside the scope of deduction provisions of income tax law[91]. Thus, as s 40-880(1) provides, a deduction under s 40-880 is "only allowed to the extent that the expenditure is not taken into account in some way elsewhere in the income tax law"[92].

47 Viewed in that context, it can be seen that the purpose of s 40-880(6) was to confine deductibility under s 40-880(2) for expenditure in relation to goodwill to expenditure in relation to goodwill that could not otherwise be brought to account under the 1997 Act. Notably, because the GMEs were a kind of property and thus CGT assets, the purchase price of the GMEs could be brought to account under the Act in the first element of the CGT cost base of the GMEs.

---

89 See 1997 Act (as at 9 June 2010), s 110-25(5A).

90 Australia, House of Representatives, *Tax Laws Amendment (2006 Measures No 1) Bill 2006*, Explanatory Memorandum at 40 [2.7], 43 [2.15], 49 [2.43], 52 [2.61].

91 See Augustinos, "Blackhole Expenditures and the Operation of Section 40-880" (2009) 38 *Australian Tax Review* 100.

92 Australia, House of Representatives, *Tax Laws Amendment (2006 Measures No 1) Bill 2006*, Explanatory Memorandum at 52 [2.61].

48 Both parties submitted before this Court, as they did before the Full Court, that the determination of whether expenditure for the acquisition of a legal or equitable right is incurred "to preserve (but not enhance) the value of goodwill" within the meaning of s 40-880(6) of the 1997 Act necessitates an assessment of the taxpayer's subjective purpose for incurring the expenditure. It is not immediately apparent that is so. Although the word "purpose" has been interpreted in the context of several other statutory provisions as denoting subjective purpose[93], it may be that different considerations apply here. Section 40-880(6) is directed to what the *expenditure* is for, and, on one view, *for* in that collocation implies an objective connection between expenditure and the object of the expenditure[94]. It is also possibly not without significance that "purpose" in s 8-1 of the 1997 Act means objective purpose[95], and it is yet to be authoritatively determined whether the purpose of subject expenditure must be the sole or dominant purpose of the expenditure[96]. For present purposes, however, it is unnecessary to reach a concluded view about those issues. It is sufficient to observe, as Thawley J found, that the evidence did not establish that the Trustee's subjective purpose in purchasing the GMEs was to preserve but not enhance the goodwill of the hotel business; and it is plain that that was not the objective purpose.

49 Before the AAT, the evidence on which Sharpcan relied to establish subjective purpose was limited to the evidence of David Canny, the directing mind of the Trustee, that he determined that the Trustee should bid for the GMEs up to the maximum price recommended in a financial advice report as to the

---

93 See, eg, *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 573 [18] per Gleeson CJ, 580 [41] per McHugh J, 585 [60] per Gummow J, 636-637 [212] per Callinan J; *Federal Commissioner of Taxation v Starr* (2007) 164 FCR 436 at 442-443 [25]-[31] per Spender, Siopis and Gilmour JJ.

94 See and compare *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 8 per Lord Denning for the Board; [1958] AC 450 at 465.

95 See *Magna Alloys* (1980) 33 ALR 213 at 215-216 per Brennan J, 233-235 per Deane and Fisher JJ.

96 See and compare, in relation to s 80B(5)(c) of the *Income Tax Assessment Act 1936* (Cth), *Federal Commissioner of Taxation v Students World (Australia) Pty Ltd* (1978) 138 CLR 251 at 265 per Mason J.

likely earnings from the GMEs, and that the Trustee bid for "exactly 18 GMEs to continue to enable [the Trustee] to operate its existing business as it had under the then existing regime"[97]. As Thawley J observed[98], that evidence demonstrated that the Trustee was motivated to purchase the GMEs by the realisation that it could not continue to carry on its gaming business unless it did so. Motive, however, is different from purpose. As Gleeson CJ noted in *News Ltd v South Sydney District Rugby League Football Club Ltd*[99], the motive for a person's conduct is the person's reason for engaging in it. By contrast, the purpose of a person's conduct is the end that is sought to be accomplished by it. Here, although it may be accepted that the Trustee's motive for purchasing the GMEs was that the Trustee wished to continue to carry on its gaming business as it had done up to that point, the end that the Trustee subjectively sought to accomplish in outlaying the purchase price of the 18 GMEs, and thus the subjective purpose of the expenditure, was to acquire the 18 GMEs necessary to continue to trade. That was also the objective purpose of the outlay. Looked at objectively from a practical and business point of view, the purpose of paying the purchase price of the GMEs was to acquire the GMEs as an asset of the Trustee to be used in the course of the Trustee's hotel business.

50 Contrary also to the majority's conclusion, the value to the Trustee of the GMEs was not solely attributable to the effect that the GMEs had on goodwill. As the majority in this Court cautioned in *Federal Commissioner of Taxation v Murry*[100], care must be taken to distinguish between the sources of goodwill and goodwill itself:

> "Goodwill is an item of property and an asset in its own right. For legal and accounting purposes, it must be separated from those assets and revenue expenditures of a business that can be individually identified and quantified in the accounts of a business."

---

97 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 224 [328].

98 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 226 [337].

99 (2003) 215 CLR 563 at 573 [18].

100 (1998) 193 CLR 605 at 617-618 [30] per Gaudron, McHugh, Gummow and Hayne JJ (footnotes omitted).

51 The majority in the Full Court found that the "Trustee incurred the outgoing to preserve the hotel business as a going concern"[101]. The majority also found that the value to the Trustee of the right to conduct gaming "was solely attributable to the effect the right had on the custom, patronage, revenue and profits of the hotel business, that is, the effect on the goodwill of the integrated hotel business undertaking"[102].

52 The majority erred in considering the effect on the goodwill of the integrated hotel business and, as appears from *Commissioner of State Revenue (WA) v Placer Dome Inc*[103], in conflating goodwill with the going concern value of the business. Here the GMEs were assets which could be individually identified and quantified in the accounts of the Trustee's business, which had a value quite apart from any contribution that they may have made to goodwill. That value resided in their capacity to generate gaming income and the fact that they could be sold and transferred to other venue operators, albeit subject to some restrictions and qualifications[104].

Conclusion

53 It follows that the appeal should be allowed. Order 1 of the Full Court should be set aside. In its place, it should be ordered that the appeal to the Full Court be allowed and that the decision of the AAT be set aside. In its place, it should be ordered that the objection decision be affirmed.

---

101 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 197 [187].

102 *Federal Commissioner of Taxation v Sharpcan Pty Ltd* (2018) 262 FCR 151 at 205 [242].

103 (2018) 93 ALJR 65 at 84 [97]-[98] per Kiefel CJ, Bell, Nettle and Gordon JJ; 362 ALR 190 at 211.

104 See and compare *Murry* (1998) 193 CLR 605 at 626-627 [57], 629 [65] per Gaudron, McHugh, Gummow and Hayne JJ.