HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S170/2023
File Title:	Automotive Invest Pty Limited v. Commissioner of Taxation
Registry:	Sydney
Document filed:	Form 27F - Appellant's Outline of oral argument
Filing party:	Appellant
Date filed:	13 Jun 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

AUTOMOTIVE INVEST PTY LIMITED
Appellant

and

COMMISSIONER OF TAXATION

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. The LCTA, as part of the A New Tax System, was enacted in 2000 to "maintain existing Government policy with respect to the taxation of luxury cars" (Explanatory Memorandum for the *A New Tax System (Luxury Car Tax) Bill 1999* at [5.3]; AS [60]). From 1986 sales tax had been imposed at a higher rate upon the sale of a vehicle having a wholesale price above a certain threshold.

3. The LCTA imposes a single stage, retail tax (s 2-1, sub-s 2-5(2)) on the "taxable supply of a luxury car" if made within – relevantly here – 2 years of the entry of that car for home consumption (para 5-10(2)(b)). The LCTA applies to "luxury cars" (s 25-1), namely cars whose value was higher than the "luxury car tax threshold" (sub-ss 25-1(3)-(5); AS [34], [36]).

4. To avoid cascading tax, registered entities are permitted to "quote" their ABN on acquisition (Division 9). This is designed to "prevent" or "avoid" luxury car tax becoming payable unless the car is sold at the retail level (sub-s 2-5(2); s 9-1). That statement of policy is also found in the Explanatory Memorandum for the *A New Tax System (Luxury Car Tax) Bill 1999* ([1.2], [1.4], [2.3], [2.25] and [5.4]; AS [40], [60]).

5. Division 15 provides for "adjustments" where circumstances occur that may mean that too much, or too little, luxury car tax was imposed (s 15-1). Subdivision 15-B, with which the Court is concerned, permits "Change of use" adjustments. That is the heading to Subdivision 15-B and it forms part of the Act (s 23-1; AS [40], [58]).

6. An entity will have an "increasing luxury car tax adjustment" in respect of a change of use if, relevantly, the taxpayer "use[s] the car for a purpose other than a *quotable purpose" (paras 15-30(3)(c) and 15-35(3)(c)). A "quotable purpose" is "a use of a *car for which you may *quote under section 9-5" (s 27-1). There are only 3 purposes for which it is permissible to quote. The first of these is "holding the car as trading stock, other than holding it for hire or lease" (AS [43], [47], [48]).

7. Where the luxury car remains, at all times, trading stock of the taxpayer who quoted, there will be no Subdivision 15-B adjustment called for. The revenue will not be deprived of the luxury car tax (if any) to which it will be entitled on the sale of that motor vehicle (FFC [28], [35], [45]). After the 2-year period, the luxury car tax on a supply will be nil, the taxing point having been passed and the car now effectively being exempt (ARS [3], [49]).

The Assessed Cars were – at all times – trading stock

8. The Appellant, a licensed motor dealer under the *Motor Dealers and Repairers Act 2013* (NSW) ("**MDR Act**"), was prohibited from offering or displaying its trading stock for sale at any place other than its licensed premises (i.e., its Gosford showroom) (s 48(1) MDR Act). Planning laws permitted the premises to be used for "Vehicle sales … premises" and expressly prohibited the use of the showroom for "the exhibition or display of items, … [in a] museum" (Gosford Local Environmental Plan 2014; AS [7], [11]).

9. Mr Denny, the sole director of the Appellant, had years of experience selling over 1.5 million mainly second hand cars, and keenly observed the various methods by which dealerships attracted custom (including cafes, cinemas and golf driving ranges as well as, in the U.S.A., a "museum" selling classic cars). The method he chose to market the Appellant's trading stock was the "museum" method because, as he saw it, that would attract a broader audience of potential purchasers as well as potentially increase the prices for the Appellant's stock (AFM 36, 39-40, FFC [62]; *Magna Alloys & Research Pty Ltd v FCT* (1980) 11 ATR 276 at 284-285 per Brennan J; AS [20]-[25]).

10. Between 2015 and 2020, the Appellant bought and sold over 800 classic vehicles each one of which was treated as trading stock of the Appellant for income and luxury car tax purposes with total sales exceeding $110 million (AFM 5-14; AS [8]). It is not in contest that each of the 40 Assessed Cars was, at all times, held as trading stock of the Appellant.

11. Admission was charged to enter the premises. No part of that admission fee was, or could be, referable to any particular car; there was no guarantee that any particular car would be displayed at the premises at a given time (it might have been sold, sent away for

paintwork or repair, or consigned elsewhere (AS [18]; AFM 5-14, 27)). There was not a museum in the legal sense. There was no static or permanent display (FFC [47]; AS [19]). Calculations of the income and outgoings of the showroom were only made in response to a request from the Respondent.

Reading paras 15-30(3)(c) and 15-35(3)(c) in proper context – there was no change of use

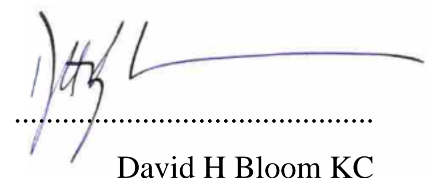
12. The application of the LCTA must be considered on a car-by-car basis (AS [27]). There can have been no "change of use" unless an Assessed Car was used in a way that resulted in its ceasing to be held as trading stock (and within the 2-year taxable period) (AS [66]).

13. A person paid the admission fee in consideration for a licence to enter the premises. This case is about the use to which each Assessed Car was put. The display for sale of an item of trading stock is not a use for a purpose which can be separated from "holding" that car as trading stock. Such display could only, by law, be in the showroom. It should make no difference whether admission to the premises is free or a charge is made. Alternatively, display in the Appellant's premises was an incidental or subservient or ancillary purpose and not a "purpose other" having regard to the cases cited by Logan J at FFC [36]-[46], [54] and *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 (AS [69], [70]).

14. The LCTA must be construed in accordance with its policy, which is about "avoiding" or "preventing" the tax from arising until the last retail sale. If necessary, given the sales tax context, this involves reading the words of the statute so as to give effect to that policy (see, *DFCT v Ellis & Clark Ltd* (1934) 52 CLR 85; *Brayson Motors Pty Ltd (In liq) v FCT* (1998) 156 CLR 651; s 15AA of the *Acts Interpretation Act 1901*; s 23-10 of the LCTA; AS [61], [63]-[65]). In this regard, it is relevant that there is a real potential for double taxation (*cf,* Starke J in *Ellis & Clark* at 88; AS [46]).

15. The GST aspect of this appeal hinges on s 9-5 of LCTA (s 69-10 of the GST Act). The words in the chapeau of s 9-5 "and for no other purpose" should be read as "no other quotable purpose". Alternatively, they too should be read so as to exclude an alternative rather than an additional use. The exclusion in subparagraph (1)(a) of trading stock held additionally for hire or lease reinforces that construction (*cf*, FFC [94]; AS [77]-[78]). If a mere additional use is a disqualifying use, there would be no need to except hire or lease.

Dated: 12 June 2024



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David H Bloom KC