



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: S170/2023
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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:**

AUTOMOTIVE INVEST PTY LTD
Appellant

and

COMMISSIONER OF TAXATION
Respondent

RESPONDENT'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: OUTLINE OF ORAL SUBMISSIONS

Overview

1. The Appellant had increasing luxury car tax adjustments because it used each car in issue for “a purpose other than” the purpose of holding it as trading stock; its GST input tax credits were capped for the same reason. The Appellant used the cars for a purpose of displaying them for reward in the Gosford Classic Car Museum.
- 10 2. The Appellant’s primary and alternative cases misconstrue the LCTA.¹ Under the consistent scheme of the Act, there is an increasing adjustment if there is a use for a purpose other than, relevantly, the purpose of holding the car as trading stock.
3. The degree, nature and intensity of the museum use was such as to give rise to an increasing adjustment under the LCTA and a reduction of credits under the GST Act.²

Construction of the LCTA

4. A supply of a luxury car is taxed if it is a taxable supply: s 5-5. A supply is not a taxable supply if the recipient “quotes” for the supply: s 5-10(2); RS [25].
5. “Double taxation” is avoided by deducting tax payable on anterior transactions: s 5-15(2), (3); RS [42]-[44], [60]; cf ARS [13]-[14].
- 20 6. There is an entitlement to quote only if there is an intention to use the car for one of the three purposes identified in s 9-5(1) and for no other purpose. Parliament contemplated that a purpose mentioned in s 9-5(1)(a)-(c) might coexist with an other purpose; in those circumstances, there is no entitlement to quote: RS [27]-[28]. However, a taxpayer is entitled to quote if it intends to use the car for two or three of those purposes, provided that it does not intend to use the car for an other purpose: RS [65(a)]. Section 9-5(1) also

¹ *A New Tax System (Luxury Car Tax) Act 1999* (Cth).

² *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

determines whether input tax credits on the creditable acquisition of a luxury car are capped under s 69-10 of the GST Act: RS [65].

7. The expression “retail level” is not defined in the LCTA. To the extent that concept is given effect to, it is through the terms of the LCTA, particularly s 9-5(1)(a)-(c): RS [58], [59].
8. The exception “other than holding for hire or lease” in s 9-5(1)(a) applies where a car is held for hire or lease as part of being trading stock: CAB 27 [70]; 70-71 [94]; *Memorex v Federal Commissioner of Taxation* (1987) 19 ATR 553; RS [51], [65]; cf ARS [7].
9. The reference to “purpose” in ss 9-5, 15-30 and 15-35 is to an objective assessment of purpose based on all of the circumstances: RS [70]-[71].
10. Division 15 provides for adjustments, on the basis that circumstances may occur after a supply or importation which mean that “too much or too little luxury car tax was imposed”: s 15-1. Decreasing and increasing adjustments are complementary opposites and should be construed consistently: RS [38].
11. Section 15-30(3) provides for increasing adjustments. Section 15-30(3)(c) applies where there is a use for a purpose other than a quotable purpose. Once the definition of “quotable purpose” is read in to s 15-30(3)(c), the sub-section is engaged if there is a use of car for a purpose other than a purpose mentioned in s 9-5(1)(a)-(c): RS [65]. An increasing adjustment may occur in respect of a car that is more than 2 years old: cf AS [49]; but cannot occur after 4 years after the relevant supply or importation: RS [61].
12. The Appellant’s argument that there is an increasing adjustment only if there is an “alternative” use of a car such that it ceases to be “trading stock” is not supported by the text, structure or purpose of the Act. The Appellant’s primary construction of s 15-30(3)(c) is disharmonious and gives rise to anomalous consequences: RS [53]-[55].

The Appellant’s alternative case – Construction

13. The Appellant’s alternative construction –that there is not an increasing adjustment where a use is consistent, incidental or subservient –is also not supported by text, structure or purpose. Inquiries into whether a use is incidental, subservient or not inconsistent with a purpose may be relevant to the objective characterisation of the use, but they are not a substitute for the inquiry posed by the text of the Act: RS [67]-[72].

14. The sales tax cases – *Ellis & Clark*³ and *Brayson Motors*⁴ – do not assist the Appellant: RS [62]; cf AS [63]-[64]. In those cases, the Court discerned a legislative plan from the operative provisions of the Act, and construed the Act in light of that legislative plan. The legislative plan in the case of the LCTA is that the supply of a car should be taxed if its intended or actual use is for a purpose other than that mentioned in s 9-5(1)(a)-(c).

15. The amendments introduced by the *Tax and Superannuation Laws Amendment (2016 Measures No 2) 2017* (Cth) were not intended to, and did not, affect the meaning of s 15-30(3)(c): cf ARS [4]-[6].

16. The extrinsic materials support the construction adopted by the primary judge and Full Court: **JBA 1256, 1272**.

The Appellant’s alternative case – characterisation

17. In ascertaining the objective purpose of a use, it is relevant to consider the degree, extent and intensity of the use and the overall impression created: *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] HCA 20 at [34], and whether the use is “wholly ancillary” to or “directly facilitates” a particular purpose: *Godolphin* at [67].

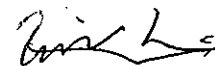
18. The “Museum” uses of each car were substantial and distinct, and were not simply ancillary, incidental or subservient: **CAB 8-32, 64, 65, 75, 77**; RS [73]-[92]; cf ARS [16]-[18]. The Museum uses were significant in size, intensity and economic return. The Appellant advertised the Museum uses, and recorded the Museum uses in public documents. Further, not all the Appellant’s cars were for sale. Having regard to the degree, nature and intensity of the Museum uses, the Courts below were correct to conclude that the cars were used for a purpose other than a quotable purpose.



Chloe Burnett SC



David Hume



David Lewis

Dated: 13 June 2024

³ (1934) 52 CLR 85.

⁴ (1985) 156 CLR 651.