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Tax Laws Amendment (2008 Measures No. 3) Bill 2008

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Contents

Tax Laws Amendment (2008 Measures No. 3) Bill 2008

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Portfolio: Treasury

Commencement: Schedules 1, Royal Assent. Schedule 1 has a retrospective effect from 1 July 2001. Schedule 2, 1 July 2008

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

This Bill makes several amendments to the following Acts:

- *Income Tax Assessment Act 1997* (ITAA97), and
- *Taxation Administration Act 1953* (TAA).

This Bill makes a number of changes to taxation legislation. As each Schedule contains a separate set of amendments they will be outlined in separate following sections.

Schedule 1 – Shareholder and unitholder rights

Background

Schedule 1 amends taxation law to overcome the impact of the High Court of Australia's decision in the *Commissioner of Taxation v McNeil* 2007 (the McNeil case).[1]

The McNeil case

Attachment 1 contains a summary of the McNeil case. Briefly, this particular case revolved around the correct assessment of a payment received by a shareholder in respect of share sell-back rights that were not exercised. The question was whether the payment

1. The Commissioner of Taxation v McNeil ATC 4223 & [2007] HCA 5.

received for these unexercised rights was ordinary tax assessable income or assessable as a capital amount and therefore subject to the Capital Gain Tax (CGT) provisions.

On appeal to the High Court, a majority ruled that the value of the sell-back rights was assessable income of the taxpayer according to ordinary concepts, and the amount was derived by the taxpayer on the listing date of those rights.

The *McNeil* decision has caused considerable uncertainty as to the future tax assessability of company distributions. It has particular relevance for companies and their shareholders, especially in regard to the tax treatment of rights issued to shareholders as a result of their existing shareholdings. Under the influence of the McNeil case the rights issued would be assessable income on the date those rights were issued.

The long standing approach is that shareholders issued with rights by companies seeking to raise capital will not have an income tax liability at the time of issue. Instead, rights issues are treated as issues on capital account and subject to the CGT provisions.

Further, subject to certain exceptions, a dividend paid out of a companies' share premium account is not a dividend, and hence not income for taxation purposes. The High Court's decision in *McNeil* also cast doubt on that long-standing approach, and raised considerable uncertainty as to the characterisation of rights and distributions arising from or related to an asset (such as shares) held by a taxpayer.

This had significant implications for the taxation of derivative securities, in particular share options. Briefly, a derivative security is one that derives its value from the financial performance of another security or group of securities.

What is an 'option'?

An option is a derivative security. Briefly, an option is the right, but not the obligation, to either buy or sell a security (such as a share).

The right to buy a security is called a 'call' option. That is the person holding the option has the right to call the security away from another party for a pre determined price. The other party must sell the security to the holder of the option for that price.

The right to sell a security is called a 'put' option. That is the holder of a put option has the right to put (or sell) the security to another party at a pre determined price. The other party is obligated to buy the security put to them at that price.

Companies routinely issue options to their shareholders or other parties to either reward and retain staff or raise capital.

What is a 'right'?

A right is a type of call option to purchase a security. A rights issue is an offer made to a holder of an existing security (say a share) to purchase additional securities issued by the same company. The offer is usually at a discount price to the existing publicly quoted market price for these securities.

Basis of policy commitment

The government's intention to amend the law to overcome the effect of the McNeil case was announced in the Treasurer's media release of 8 April 2008.[2]

The former government had also intended to take similar legislative action.[3]

Committee Consideration

Both the government and the opposition support referring this Bill to the Senate Standing Committee on Economics.[4]

Position of significant interest groups/press commentary

The implications of the High Court's decision in McNeil's case generally alarmed business and taxpayer groups. The announcements in 2007 and 2008 that the government would change legislation to overcome these implications were widely and warmly received.[5]

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2. The Hon. Wayne Swan MP, Treasurer, 'Taxation of call options issued by companies', *media release*, Canberra, No. 19, 8 April 2008.

3. The Hon. Peter Dutton MP, 'Taxation of rights issues', *media release*, Canberra, No. 74, 26 June 2007.

4. The Hon. Chris Bowen MP, Minister for Competition Policy and Consumer Affairs and Assistant Treasurer, Second reading debate: Tax Laws Amendment (2008 Measures No. 3) Bill 2008, House of Representatives, *Debates*, 5 June 2008, p. 32 and Mr Michael Keenan MP, Second reading debate: Tax Laws Amendment (2008 Measures No. 3) Bill 2008, House of Representatives, *Debates*, 5 June 2008, p. 29.

5. Tony Greco, 2007Chief Executive Officer Taxpayers Australia, 'Rights Issues – Wider implications of McNeil case' *Letter to the then Minister for Finance and Assistant Treasurer*, 4 May 2007, and 'Wider implication of McNeil Case, Editorial, *The Taxpayer*, 4 June 2007, p. 354 – 356; Fleur Anderson, 'PMs tax fix for rights issues', *Australian Financial Review*, 26 June 2007, p. 1; Caitlin O'Toole, 'Relief due for rights issues', *Australian Financial Review*, 18 April 2008, p. 30.

Pros and cons

The proposed amendments restore certainty to the tax treatment of the issue of rights and options to individual shareholders and institutions.

However, the receipt of income from this source is deferred until the security arising from the issue of this right or option is sold. This may not occur for some years.

Financial implications

The Explanatory Memoranda notes that this particular measure will not have a financial impact.[6]

Key issues

The key issues behind this particular measure is maintaining the consistency to the tax treatment of the issue of rights and options by a company.

Main provisions

Item 2 of **Schedule 1** inserts **new section 59-40** into the *Income Tax Assessment Act 1997* (ITAA97). The effect of this new section is that the issue of a right, or a call option, by a company is not assessable income and is not exempt income for taxation purposes, provided that:

- at the time of issue the taxpayer must already own shares in a company or units in a trust and the issues rights derive from these units or shares
- the shares or units owned cannot be 'trading stock'; that is they cannot be shares or units owned for the purposes of gaining an income through trading on a stock exchange or other securities market
- they are not shares or units acquired through an employee share scheme, and
- the shares or units cannot be a convertible interest. That is the shares or units are not securities that can be converted into another class of security, say a bond.

The classification of income arising from such transactions as non-assessable, non-exempt income does not mean that receiving a 'right' or a call option is tax free. Rather, the

6. The Hon. Wayne Swan MP, Treasurer, *Explanatory Memorandum to the Tax Laws Amendment (2008 Measures No. 3) Bill 2008* (hereafter the Explanatory Memorandum), 29 May 2008, p. 3.

income arising from the eventual sale of this security is not taxed as ordinary personal income.

Item 7 inserts **new section 112-37** into the ITAA97. The effect of this new section is to prevent double taxation from occurring where a company issues a put option.

Under the proposed law the market value of any put option issued is included in the taxpayers assessable income at the time the put option is issued.

To prevent this amount from being subject to further taxation under the CGT regime, under the proposed amendments in **Item 7** the market value of the put option is also included in the cost base of the put option for CGT purposes. It is only the difference between the cost base and the eventual selling price of the security that is subject to CGT.

Item 9 applies these amendments to rights or call options issues on or after 1 July 2001. This retrospective date was the start of the financial year immediately after the original Administrative Appeals Tribunal review of McNeil's case was concluded. This retrospective effect was sought by representative stakeholders in the interests of, and for, the benefit of taxpayers and is explained in the Explanatory Memoranda.[7]

Schedule 2 – Restriction on GST refunds and time limits for recovery and refund of indirect tax

Background

Schedule 2 amends the *Taxation Administration Act 1953* (TAA) so that:

- problems with the scope of Goods and Services Tax (GST) refunds caused by the decision in *KAP Motors v The Commissioner of Taxation*[8] are overcome, and
- problems with the four year time limit on the refund of indirect taxes are dealt with
  - briefly, the changes to time limits ensure that the four-year time limit on recovery applies where a GST refund is overpaid to a taxpayer. In addition it ensures that the four-year time limit applies where a refund is payable by the Commissioner due to a reduction in the GST liability of a taxpayer.

GST Overview

Briefly, GST is levied when a supply of goods and services is made. For example, if a vehicle retail operation sells a motor vehicle to a taxpayer a supply of that motor vehicle is made. The sale price of that motor vehicle will include the GST payable. The vehicle

7. Explanatory Memoranda, paragraphs 1.25 to 1.37, p. 12.

8. KAP Motors v Commissioner of Taxation [2008] FCA 159.

retailer will claim an input tax credit for the GST paid as a result of the supply of that motor vehicle.

KAP Motors v The Commissioner of Taxation

A summary of this case is at Attachment 2. This case centred on whether the Commissioner of Taxation had to refund GST mistakenly paid to him by two car dealerships, before they had reimbursed the end customers for the mistakenly paid tax. These car dealerships (the taxpayers) had mistakenly paid the GST in respect of a number of transactions where the goods and services were not actually supplied to the end customers by them.

Briefly, the decision in this case held that two taxpayers were entitled to a refund of GST mistakenly remitted to the Commissioner before they had reimbursed the end customer. The Court decided that, in this particular case, as no actual goods or services had been supplied to the end customers that no GST was payable. The particular wording of **section 105-65** of **Schedule 1** of the TAA allows a refund of mistakenly paid GST to be made, where no actual supply of goods or services to a customer has occurred, before a refund of an equal amount of the GST paid is made to the end customer.

GST Refunds

The general approach to refunds of overpaid GST is that that the benefit of the refund goes to the person who has borne the tax. Generally those who have borne the tax are the persons who purchased the goods (in this case motor vehicles) from the taxpayers. Hence, a business that has overpaid GST to the Commissioner must refund that amount to the customer before obtaining a refund.[9] Obviously, that was not the outcome of the KAP Motors case.

This approach is intended to prevent a windfall gain to businesses that have not borne the GST, but have passed that impost on the customer. In these circumstances a windfall could occur if the business obtained the GST refund without immediately refunding that amount to the end customer.

Basis of policy commitment

The measures in **Schedule 2** of this Bill were announced in the Treasurer's media release of 6 May 2008.[10]

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9. The Hon. Wayne Swan, Treasurer, 'Indirect tax refunds and amendment time limits', *media release*, No. 30, Canberra, 6 May 2008.

10. The Hon. Wayne Swan MP, op. cit.

Position of significant interest groups/press commentary

There has been comparatively little comment on the proposed change to the refund of GST provisions. However, it has been noted that business that would claim a refund of overpaid GST would first have to make a payment to affected customers.

In respect to the time limits issue it has been noted that the proposed changes puts the Australian Taxation Office (ATO) and the taxpayer on an equal footing. The ATO can only go back 4 years while many taxpayers can claim refunds from 8 years ago (i.e. 2000 and the commencement of the GST regime).[11]

Pros and cons

The proposed changes seek to reinforce the original intention of the GST refunds policy – namely that a refund of overpaid GST will only be made where the customer is first reimbursed.

However, the refund of GST is likely to be slow in coming and businesses who first refunded the overpaid GST to their customers may be out of pocket for some time before the ATO pays the relevant refund.

Any consequences of failure to pass

It is possible that if these particular amendments are not passed then the GST system would provide an avenue for business to claim an undue refund of GST already paid.

Financial implications

The Explanatory Memoranda notes that this measure will have a small but unquantifiable impact on GST, the wine equalisation tax, luxury car tax revenue and fuel tax credit entitlements.[12]

Key issues

The key issue in relation to this amendment is the maintenance the integrity of the GST system. There are some indications that companies may be rapidly moving to take advantage of the KAP Motors decision to seek a refund of GST from the ATO where they

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11. Caitilin O'Toole, 'Grip tightens on GST refunds', *Australian Financial Review*, 7 May 2008, p. 3.

12. Explanatory Memoranda, p. 4.

would not previously been entitled to do so.[13] The possible impact on revenue has been reported to be between $300 and $500 million.[14]

Main provisions

Part 1

Item 5 inserts new **subsection 105-50(2)** in **Schedule 1** of the TAA. The effect of this amendment is to limit the period during which the Commission of Taxation may recover any refunds of indirect tax (including fuel tax) to which the taxpayer was not entitled to, to four years from the date that refund first become payable.

This amendment does not apply if during that four year period the Commissioner has given notice that he or she requires a repayment of an excess refund, or that fraud or evasion was involved in the initial payment of the refund or granting of an indirect tax credit.

Items 7 to **15** amend **section 105-55** in **Schedule 1** of the TAA so that the four year limit for claiming refunds and credits in relation of overpaid indirect tax of fuel tax apples. This means that a taxpayer generally has only four years in which to claim a refund of overpaid GST, fuel tax or other indirect tax.

Item 16 apples these amendment to amounts that remain to be paid, by either the taxpayer, or the Commissioner, before or after the commencement of **Schedule 2** of this Bill (1 July 2008), unless the Commissioner has notified the taxpayer in writing that amounts were payable before that date, or the taxpayer or Commissioner had notified the other of an entitlement to a refund etc before that date.

In effect, although these amendments, if passed, will come into effect on 1 July 2008, they will still apply to obligations and entitlements created prior to that date.

Part 2

Item 17 repeals **section 105-65** of **Schedule 1** of the TAA and replaces it with a new section. The impact of the new section is that the Commissioner need not refund an overpaid GST amount where no supply of goods occurred and either:

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13. See Blake, Dawson, 'GST Bulletin', (accessed 3 June 2008) and Maddocks Lawyers, 'Update –tax disputes – Important GST Refund Opportunity', 10 March 2008 (accessed 2 June 2008).

14. Caitlin O'Tool, op. cit; Jesse Hogan, 'Car-dealer ruling takes $500m toll, *The Age*, 14 May 2008, p. 9.

- the Commissioner is not satisfied that the taxpayer has first reimbursed the person to whom the supply was made, or
- the recipient of the goods or services was registered for GST purposes or required to be registered for GST purposes.

Item 18 requires the amendment made by **Item 17** above applies on or after 1 July 2008.

Concluding Comments

Schedules 3 and **4** of the original Bill have been removed by government amendment and will be re-presented in a new Bill to allow for speedy passage. This is due to the likelihood that **Schedules 1** and **2** in this Bill will be referred to the Senate Standing Committee on Economics for consideration.[15]

15. Second reading debate: Tax Laws Amendment (2008 Measures No. 3) Bill 2008, House of Representatives, *Debates*, 5 June 2008, pp. 29–34.

Attachment 1

McNeil Case

FC of T v McNEIL

2007 ATC 4223

High Court citation: [2007] HCA 5

High Court of Australia,

22 February 2007

Income tax — Assessable income — Taxpayer held shares in bank — Taxpayer acquired an interest in sell back rights entitling her to sell shares back to bank — Sell back rights listed for trading on ASX — Taxpayer did not exercise her entitlement to trade in her sell back rights on ASX — Taxpayer subsequently received an amount for her sell back rights according to a pre-determined formula — Whether sell back rights or proceeds from disposal of sell back rights income according to ordinary concepts — Whether a return of capital to taxpayer — Whether sell back rights severed or detached from shareholder's shares — Whether provisions dealing with dividends a code restricting general taxing provision — Income Tax Assessment Act 1997, s 6-5 — Income Tax Assessment Act 1936, s 44.

This was an appeal from a decision of the Full Federal Court reported at 2005 ATC 4658.

The taxpayer was a retiree who had a portfolio of shares in listed public companies. She held 5,450 shares in St George Bank Limited ("SGL") for the purpose of deriving dividend income on which she relied for part of her living expenses. The taxpayer acquired the shares between 1987 and 1997 and had never traded in shares or securities.

In January 2001 SGL announced its intention to buy back about 5% of its issued share capital. The buy back price was fixed at $16.50 per share, which represented a premium of 18.9% over the price of SGL shares on the Stock Exchange ("ASX") at that time.

A number of documents ("the transaction documents") were executed by SGL, a corporate trustee ("Custodial") and a merchant bank ("CSFB") to give effect to the share buy back. In accordance with those documents, SGL granted Custodial, for the absolute benefit of the taxpayer, 272 sell back rights, being one sell back right for each parcel of 20 shares she held in SGL. Each sell back right obliged SGL to purchase one of its shares out of each such parcel.

At the same time, the sell back rights themselves were listed for trading on the ASX and their value at that time was $1.89 each. The taxpayer did not give a direction to realise her sell back rights by that time so she became a "remaining shareholder". In accordance with the transaction documents, Custodial transferred the taxpayer's sell back rights to CSFB. It then sold them to SGL for an amount calculated in accordance with a formula stipulated in the transaction documents. CSFB then paid the taxpayer $2.12 for each sell back right so that she received a total of $576.64.

The Commissioner assessed the taxpayer to tax for the year of income ended 30 June 2001 ("the relevant year") on the basis of the tax return lodged by her. The return included an amount of $576, comprised of $514 of ordinary income in respect of the value of the sell back rights granted to Custodial plus a capital gain of $62. The capital gain was calculated by subtracting the value of each sell back right granted to Custodial ($1.89) from the amount the taxpayer received for each sell back right from CSFB ($2.12).

The taxpayer objected to the inclusion in her assessable income of the $514 on the basis that it was not assessable either as ordinary income or as a capital gain. The taxpayer's objection was disallowed and, as part of the test case program, she appealed.

The Commissioner argued before the trial judge that the sum of $514, representing the market value of the sell back rights when they were granted, was income according to ordinary concepts. Alternatively, the sum of $576.64 received by the taxpayer from CSFB was the same kind of income. The Commissioner also submitted that the grant of the sell back rights was an "act, transaction or event" that occurred in relation to the SGL shares already owned by the taxpayer. As a result, the taxpayer made a capital gain pursuant to s 104-155 of the Income Tax Assessment Act 1997 ("the Act") of not less than $514 on the day the sell back rights were listed on the ASX.

The taxpayer contended that amounts received by a shareholder from a company in which he or she held shares did not constitute income unless it was a dividend or the product of employment or other services rendered by the shareholder. She also argued that there was no relevant connection that permitted the Commissioner to rely on s 104-155 to establish a capital gain. By the time the sell back rights were listed for trading on the ASX, the taxpayer's ownership of SGL shares was irrelevant to any subsequent realisation of her sell back rights.

The Federal Court allowed the taxpayer's appeal. It held that the derivation by the taxpayer of the sum of either $514 or $576 was referable entirely to the taxpayer's existing shareholding in SGL and, as there was no fund or source of profits in SGL out of which either sum originated, neither amount was ordinary income. The court also held that it was commercially unrealistic to describe the imputed figure of $514 as "capital proceeds" within s 104-155. That sum was only based on the initial trading day's average trading transactions in the sell back rights on the ASX. The taxpayer was merely a shareholder who had not exercised her entitlement to trade in the sell back rights. Therefore, there was no justification for saying that trading in sell back rights on the ASX on the first listing day was an act, transaction or event occurring in relation to the taxpayer's sell back rights within s 104-155.

The Commissioner's appeal to the Full Federal Court was dismissed by majority. It held that neither the entitlement created in favour of the taxpayer under the buy back scheme nor the proceeds of that entitlement was income according to ordinary concepts. The sell back rights and the moneys received from their sale were not derived from the taxpayer's shares but from the scheme that varied the entitlements attached to those shares. The Full Federal Court also held that no taxable capital gain was derived by the taxpayer. French J held the relevant entitlement and the proceeds did not occur in relation to a CGT asset owned by the taxpayer. Dowsett J held that no relevant capital proceeds were derived from the "act, transaction or event" identified by the Commissioner, namely the issue of the sell back rights.

In dissent, Emmett J held that the payment of $576.54 was something that proceeded from the taxpayer's shares in SGL because the benefit of the sell back rights was derived from the taxpayer's shares. It was therefore income according to ordinary concepts.

The Commissioner appealed, primarily contending that the grant of the 272 sell back rights in respect of the taxpayer's shareholding and held for absolute benefit by Custodial was the derivation of income by her in an amount of $514.

The taxpayer contended that the Commissioner's primary contention erred by treating the sell back rights as being severed or detached from the taxpayer's shares. The taxpayer had a "general right" to returns of capital, this being part of the variety of rights making up each share, and the grant by SGL of the sell back rights in effectuation of the foregoing general right. Secondly, the provisions in the ITAA 1997 and where relevant the Income Tax Assessment Act 1936 dealing with dividends constituted a complete "code" that restricted the operation of the general taxing provision (s 6-5) in the circumstances under consideration.

Held: appeal allowed (Callinan J dissenting).

1. The majority of the Full Court erred in application of the principles respecting the derivation of income according to ordinary concepts. The Commissioner's primary submission should be accepted.

2. It was insufficient to say that SGL issued the sell back rights to Custodial on behalf of shareholders "in partial satisfaction of the shareholders' right to participate in reductions of capital", this being "within the congeries of rights comprising the shares". It was the character of the grant of rights to the shareholders that was decisive. It was not the reduction of capital effected by SGL pursuant to the new statutory processes provided by the Corporations Law. The gain made by the taxpayer upon grant of the sell back rights and the subsequent receipt of the proceeds of sale on her behalf was not the receipt of a distribution of any form of the assets of SGL. Nor was the sell back scheme provided "in satisfaction" of the rights of shareholders under the constitution of SGL. The scheme took its life from the deeds poll executed on the record date.

3. Both sides agreed that the taxpayer's sell back rights were not "dividends" in the statutory sense. It might be assumed for present purposes that the rights otherwise would give rise to income according to ordinary concepts. Nevertheless, if the "code" argument was correct, they could not do so. It would be a heroic exercise, and certainly not one previously undertaken in the cases to which the taxpayer referred, to construe the dividend provisions, which bring in gains, some of which would otherwise be of a capital nature, as implicitly excluding from the general income provision what otherwise would fall within it. The exercise must fail.

[*Headnote by Anthony Smyth*]

Source: CCH Australian Tax Cases 2008

Attachment 2

KAP Motors Vs Commissioner for Taxation

KAP MOTORS PTY LTD & ANOR v FC of T

2008 ATC Media neutral citation: [2008] FCA 159

Federal Court, Sydney,

28 February 2008

Goods and services tax (GST) — Refund of GST — GST remitted to Commissioner by mistake — Whether s 105-65 of Sch 1 of Taxation Administration Act applied to preclude taxpayers' entitlement to refund — Whether s 105-65 applied to transactions involving no supply — Whether taxpayers required under general law to have reimbursed persons who made the payments to them — A New Tax System (Goods and Services Tax) Act 1999, s 7-1, 9-5, 9-10, 9-15, 11-5, 11-15 — Taxation Administration Act 1953, Sch 1, s 105-65.

The two taxpayers were retail dealers of new motor vehicles. During the relevant period, there were arrangements in place between the taxpayers and various motor vehicle distributors under which the distributor would pay a rebate, known as a holdback payment, to the appropriate taxpayer in relation to each new motor vehicle ordered from the distributor and acquired and sold pursuant to a floor plan arrangement. These arrangements, however, did not form part of the dealership agreements between the distributors and the taxpayers.

Once a motor vehicle had been dispatched pursuant to the floor plan arrangements, the distributor would issue a Recipient Created Tax Invoice to the taxpayer, which included details of the holdback payment relating to that particular motor vehicle. During the period 1 July 2000 to 30 April 2005, the taxpayers collectively remitted GST totalling $407,187 to the Commissioner in respect of the holdback payments.

The present proceeding was conducted on the basis that it was common ground between the parties that the holdback payments received by the taxpayers were not consideration for any goods or services supplied by the taxpayers to the distributors. Therefore, there was no taxable supply by the taxpayers and the taxpayers were not liable to pay GST in respect of the holdback payments that they had received.

The taxpayers claimed that they acted under the mistaken belief that the holdback payments were taxable supplies and that they were liable to GST in respect of them. The taxpayers had neither reimbursed the distributors for amounts corresponding to the GST they had remitted to the Commissioner nor had they agreed to do so.

The Commissioner claimed that s 105-65 of Sch 1 of the *Taxation Administration Act 1953* applied and that he was not required to refund the remitted GST to the taxpayers.

The Commissioner contended that s 105-65(1) should be construed as though the word "supply" included a purported supply or a putative supply such that it referred non-technically to any transaction that was incorrectly treated as a taxable supply. Alternatively, the Commissioner contended that he was not required to refund the GST because the taxpayers had not reimbursed, or agreed to reimburse, the amount of the remitted GST to the distributors.

Held: taxpayers entitled to refund of overpaid GST.

1. Section 105-65 did not operate to preclude the entitlement of the taxpayers to a refund of the GST remitted by them in respect of the holdback payments.

2. In its terms, s 105-65 was limited to circumstances where there was a supply that was not a taxable supply. It did not in its terms extend to some transaction that did not involve a supply within the meaning of the GST Act.

3. It was not difficult to postulate examples of a supply within the meaning of that word when used in the GST Act that was not a taxable supply. Thus, there was considerable scope for the operation of the provision construed literally as referring only to a supply as defined and not extending to cover a purported or putative supply.

4. The taxpayers' entitlement to a refund was not precluded by the general law in the absence of their refunding or undertaking to refund a corresponding amount to the distributors.

5. It was difficult to understand why, as between the taxpayers, on the one hand, and the Commissioner, on the other, the failure to pass on refunded GST to the relevant distributors should constitute conduct that would disentitle the taxpayers from recovering from the Commissioner moneys that should never have been paid to the Commissioner.

6. The concept of impoverishment as a co-relative of enrichment was foreign to Australian law. Even if there were any equity in favour of the distributors attaching to the fruits of any judgment that taxpayers might recover against the Commissioner, that circumstance was quite irrelevant to this proceeding.

Headnote by Bill Page

Before: Emmett J.

Source: CCH Australian Tax Cases 2008

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2495.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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