

**COMMISSIONER OF TAXATION v. UNIT TREND SERVICES PTY LTD**  
**(B61/2012)**

Court appealed from: Full Court of the Federal Court of Australia  
[2012] FCAFC 112

Date of Judgment: 17 August 2012

Date referred into Full Court: 14 December 2012

Unit Trend, the respondent, is in dispute with the Commissioner of Taxation, the applicant, about GST liabilities arising on sales to third party purchasers of apartments in two high-rise towers in the centre of Surfers Paradise.

The Full Federal Court upheld the respondent's appeal from the decision of the Administrative Appeals Tribunal ("the AAT"). The AAT had applied the anti-avoidance provisions in Div 165 of the *A New Tax System (Goods and Services Tax) 1999 (Cth)* (the "GST Act") to negate GST benefits in excess of \$21 million in the context of the application of the margin scheme.

The respondent was the representative member of a GST group which included Simnat Pty Ltd ("Simnat"), Blesford Pty Ltd ("Blesford") and Mooreville Investments Pty Ltd ("Mooreville"). Simnat acquired land prior to 1 July 2000 with the intention of developing the land and selling to members of the public completed apartments in a resort development.

Prior to the sale of completed apartments to the public, a sale of some of the apartments whilst partially completed had taken place between Simnat and Blesford on the one hand, and Simnat and Mooreville on the other hand. The sales were completed in 2004. The applicant conceded that these were supplies of a going concern and thus were GST free.

In the subsequent sales of the completed apartments to members of the public, Blesford and Mooreville elected to invoke the provisions of the margin scheme under Div 75, and used the stepped up consideration of the respective acquisitions from Simnat to calculate the margin.

In applying Div 165 negating the GST benefits, the applicant alleged that the sale of the partially completed apartments from Simnat to either Blesford or Mooreville was part of a scheme which gave a higher value for the purposes of the margin scheme and this reduced the amount of GST payable.

The AAT held that for supplies up to and including 16 March 2005 (when Div 75 of the GST Act was amended), the taxpayer was entitled, subject to the potential application of Div 165, to apply the margin scheme on the basis that the consideration for the acquisition was the sale price between Simnat and Blesford and Simnat and Mooreville. However, the AAT held that Div 165 applied to supplies up to and including 16 March 2005 insofar as they were made pursuant to contracts entered into between Simnat and members of the public before the sale, by Simnat, of the partially complete apartments to either Blesford or Mooreville. In contrast, Div 165 had no application to supplies made pursuant to contracts entered into between either Blesford or Mooreville and members of the public, after the sale by Simnat.

The AAT further held that for supplies on and from 17 March 2005, the taxpayer ought to be given the opportunity to produce to the Commissioner an approved valuation of the apartments as at 1 July 2000.

The respondent appealed. The Full Court, Dowsett, Bennett and Greenwood JJ, by majority, Dowsett J dissenting, held that for all settlements up to and including 16 March 2005, Div 165 did not operate because it was excluded as the GST benefit on the end purchaser transactions was attributable to the choices or elections made by the respondent in relation to a going concern, grouping and the margin scheme, as provided for in s 165-5(1)(b).

On 14 December 2012 the Chief Justice and Justice Gageler referred this application to an enlarged bench, for argument as on an appeal.

The questions of law said to justify the grant of special leave include:

- Did the majority of the Full Court of the Federal Court correctly construe and apply s 165-5(1)(b) of the GST Act?