IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B61 of 2012**

BETWEEN: **COMMISSIONER OF TAXATION**
Applicant

and

UNIT TREND SERVICES PTY LTD (ACN 010 382 242)
Respondent

APPLICANT'S REPLY

Part I: Internet publication

1. The applicant ("**the Commissioner**") certifies that the reply is in a form suitable for publication on the internet.

Part II: Concise reply

2. The essence of the submissions of the respondent ("**Unit Trend**") is as follows. First, the phrase "attributable to" in s.165-5(1)(b) of the *A New Tax System (Goods and Services Tax) Act* 1999 ("**the GST Act**") requires nothing more than "a contributory causal connection" between the (express) choice and the GST benefit (consistently with the findings of the majority, Greenwood and Bennett JJ).[1] Secondly, the test advanced by the Commissioner would be satisfied in relation to two of the express choices made in the present case.[2] Thirdly, the meaning of "attributable to" has been "materially affected" or "modified" by the introduction of s.165-5(3) of the GST Act (and that the special leave questions may be answered differently in future litigation).[3] Fourthly, the interpretation advanced by the Commissioner would render s.165-5(3) otiose.[4] Fifthly, a decision in the present case would not have utility for the purposes of construing Division 75 of the *Fuel Tax Act* 2006 (Cth) ("**the Fuel Tax Act**").[5] Each of these submissions should be rejected.

The meaning of "attributable to"

3. The phrase "attributable to" is capable of embracing connections of varying strength. It should be interpreted consistently with the object or purpose of Division 165, and, in particular, s.165-5(1)(b), of the GST Act.

4. Contrary to Unit Trend's contentions at paragraphs 19(a) and (b) of its submissions, the Commissioner's approach to the interpretation of s.165-5(1)(b) is

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1 Respondent's ("Unit Trend's") summary of argument, [19(a)] and [19(a)]. See also [27(e)(ii)], [27(h)].
2 Unit Trend's summary of argument, [14]-[18].
3 Unit Trend's summary of argument, [27(a)] and [27(d)]. See also [20(c)(ii)].
4 Unit Trend's summary of argument, [27(e)(i)].
5 Unit Trend's summary of argument, [27(f)].

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consistent with the observations of French CJ and Hayne J in *Certain Lloyds Underwriters v Cross*[6]. Their Honours observed[7] that the context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky*, "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all provisions of the statute".

5. The matters addressed at paragraphs [24] and [31]-[35] of the Commissioner's primary submissions demonstrate that the interpretation contended for by the Commissioner should be preferred to that advanced by Unit Trend.

6. The proper approach to the interpretation of s.165-5 as originally enacted is not to attempt to give effect to the absence of s.165-5(3) (as contended by Unit Trend at paragraph [21] of its summary of argument). The proper approach is to determine the meaning of s.165-5(1)(b) having regard to the language, context and purpose of the provision.

The proximate or immediate causal connection is not established

7. Unit Trend contends (at paragraphs [12], [13], [16] and [18]) that even if the interpretation advanced by the Commissioner were accepted, that test would be satisfied on the facts here in relation to each of the going concern choice and the GST group choice; that without each such choice "there would have been no GST benefit". This is a re-run of the "but for" test. This argument is premised on an incorrect characterisation of the GST benefit found to have been produced by the scheme in the present case. The GST benefit is identified in paragraph 18 of the Commissioner's primary submissions. The benefit was the reduction in the GST payable on the supplies to end buyers as a result of the transfer of Towers II and III at an advanced stage of construction with a resultant uplift in the cost base used in calculating the margin.

8. Without either the going concern choice or the GST group choice, GST would have been payable on the supply of Towers II and III to Blesford and Mooreville respectively. Either choice resulted in the supplies of Towers II and III by Simnat being free of GST. Neither the making of the going concern choice nor the making of the GST group choice had a proximate or immediate causal connection with the getting of the GST benefit. The GST benefit was the product of the interaction between the "commercial" choice (i.e. to transfer Towers II and III to Blesford and Mooreville at an advanced stage of construction), the choice to apply the margin scheme[8] and the GST group choice (or, alternatively, the going concern choice[9]).

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6 Cited at paragraph 19(a) of Unit Trend's summary of argument.

7 (2012) 293 ALR 412; [2012] HCA 56 at [24].

8 Full Court Reasons at [66], [71] and [198] per the majority. See also [44]-[45] per Dowsett J. Cf Unit Trend's summary of argument, [7].

9 Dowsett J observed that the going concern choice seems to be of little significance given that the transfers were intra-group sales and taken not to be taxable supplies: Full Court Reasons [45].

9. Further, Unit Trend contends (at paragraph [19(c)]) that, but does not explain why, the negative test in s.165-5(1)(b) is satisfied if the GST benefit can be said to be attributable to two or more (express) choices.[10] Unit Trend does not address how that conclusion is consistent with the object of Division 165, in particular s 165-5(1)(b).

The example

10. Unit Trend has postulated a scenario (at paragraphs [24]-[26]) in an attempt to demonstrate why the Commissioner's interpretation should not be accepted. This argument does not withstand scrutiny. The example assumes that A supplies goods to a GST group member, C, rather than to B. The supply by A to C is treated as not being a taxable supply by virtue of s.48-40(2)(a) (in contrast to the previous taxable supplies from A to B). It is the non-taxable supply by A to C that gives rise to the GST benefit; the purported deferral of GST liability is not the relevant GST benefit. The GST benefit from the postulated scheme arises under s.165-10(1)(a) rather than s.165-10(1)(c). The proximate or immediate cause of the GST benefit from that scheme would be the choice to form a GST group between A and C.

Subsection 165-5(3) does not modify the meaning of "attributable to"

11. Unit Trend contends (at paragraph [20(c)(ii)]) that s.165-5(3) modifies the meaning of "attributable to" "by reference to benefits got '*from*' a scheme (rather than attributable to the 'choice' etc) where the relevant state of affairs was created to enable the relevant choice etc to be made". The language of s.165-5(3) does not support the submission. The opening words of s.165-5(3) merely echo the words of s.165-5(1)(a), namely that an entity (the avoider) gets or got a "GST benefit"[11] from a scheme. That is "the" GST benefit contemplated by s.165-5(1)(b).

12. In a case where a GST benefit would otherwise be "attributable to" the making of a choice, then (and only then) consideration needs to be given to whether the elements of subsections 165-5(3)(a) and (b) are satisfied (cf paragraph 1.56 of the Explanatory Memorandum to the *Tax Laws Amendment (2008 Measures No. 5) Bill* 2008 ("**the Measures No. 5 EM**").

13. Unit Trend's suggestion (at paragraph [22]) that paragraph 1.20 of the Measures No. 5 EM indicates that s.165-5(3) appears to be directed to a scheme such as the present is inconsistent with paragraph 1.54 of the EM which states:

> "The reduction in the margin that arises because of the interposition of a GST-free or non-taxable supply is not attributable to, for instance, the agreement to apply the margin scheme or that a supply is a supply of a going concern, but rather to the overall arrangement, including the interposing of the intermediate supply, of which the choice or agreement is but one part."

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10 See the Commissioner's primary submissions at [41]-[42].

11 See s.165-10 of the GST Act.

14. Thus, the Measures No. 5 EM contemplates that s.165-5(3) would have no work to do in relation to a scheme such as the present. Dowsett J's conclusions at [47]-[48] of the Reasons below are consistent with the matters expressed in paragraph 1.54 of the Measures No. 5 EM.

15. There is no suggestion in the language of s.165-5(3) or in the content of the Measures No. 5 EM that Parliament intended to alter the meaning of "attributable to" in s.165-5(1)(b).

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Subsection 165-5(3) is not rendered otiose

16. Unit Trend contends (at paragraph [27(e)(i)]) that, but does not explain, how the Commissioner's interpretation would render s.165-5(3) otiose.

17. It is evident from the Measures No. 5 EM that Parliament's intention was that s.165-5(3) act as a safety net for some of the GST scheme benefits that s.165-5(1)(b) would otherwise exempt.[12]

20 18. One example of the potential application of s.165-5(3) given in the Measures No. 5 EM concerns a series of applications of the going concern concession to avoid GST; each separate supply involved the supply of a GST-free going concern.[13]

19. The interpretation advanced by Unit Trend would result in s.165-5(3), rather than s.165-5(1)(b), operating as the primary provision for determining whether a GST benefit was attributable to an express choice. That is, a test requiring merely a contributory causal connection would allow many scheme benefits to satisfy the s.165-5(1)(b) exception (e.g. any scheme which includes the making of an express choice which plays a contributing role in the gaining of the GST benefit). In those
30 cases, the object of deterring artificial or contrived schemes to give entities GST benefits would fall to s.165-5(3). And s.165-5(3) would not catch such benefits unless the requirements of subsections (a) and (b) were satisfied[14] (in relation to <u>each</u> choice contributing to the GST benefit if the majority's reasoning were to stand). This is not the meaning that the legislature should be taken to have intended the provisions to have.

The Fuel Tax Act

20. Division 75 of the Fuel Tax Act is couched in analogous terms to Division 165 of
40 the GST Act as it stood <u>prior</u> to the introduction of s.165-5(3). Subsection 75-5(1)(b) of the Fuel Tax Act is in materially the same[15] terms to s.165-5(1)(b) of the GST Act. The reasoning of the majority in the present case would apply with equal force to a consideration of s.75-5(1)(b) of the Fuel Tax Act.

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12 See paragraphs 1.56 – 1.60.

13 See paragraphs 1.59 – 1.60. However, even in that example, it is suggested that the GST benefit would not be "attributable to" the relevant express choice in the first instance.

14 See paragraphs [47] and [48] of the Commissioner's primary submissions.

15 Section 75-5(1)(b) refers to "fuel tax benefit" not "GST benefit" and refers to "the fuel tax law or the GST law" rather than "the GST law, the wine tax law or the luxury car tax law".

Unit Trend has not articulated any basis upon which such reasoning would not be applicable.

Miscellaneous

21. The fact that the GST benefit obtained from the scheme the subject of the present case could not be obtained after 16 March 2005 (as contended by Unit Trend at paragraph [27(c)]) in no way diminishes the importance of the special leave questions. The interpretation of s.165-5(1)(b) is fundamental to the operation of Division 165 in relation to all schemes. This also addresses Unit Trend's submission (at paragraph [27(c)]) that because part only of the amount originally in dispute remains in dispute, special leave should be refused. In any event, that matter of itself would not be a proper ground for refusing leave.

Conclusion

22. The Commissioner's application for special leave raises for consideration the proper interpretation of a key provision in the application of Division 165 of the GST Act (an anti-avoidance provision). The interpretation of s.165-5(1)(b) has resulted in divergent views between the majority and Dowsett J which cannot be reconciled. The conclusion reached by the majority is, with respect, incorrect (for the reasons articulated in paragraphs [40]-[46] of the Commissioner's primary submissions). Special leave to appeal should be granted and the appeal allowed.

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