



HIGH COURT OF AUSTRALIA

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COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v CITYLINK MELBOURNE (formerly known as Transurban City Link Limited)

Concession fees paid by Citylink to the State of Victoria are allowable tax deductions, the High Court of Australia held today.

The State contracted with Citylink to design, construct and operate the City Link system of roads connecting three Melbourne freeways. City Link opened on 15 August 1999 with tolls imposed from 3 January 2000. Under a concession deed signed in 1995, Victoria contributed the land and enabled Citylink to levy tolls. In return, Citylink pays an annual concession fee of at least \$95.6 million during the first 25 years of the concession period of 1996 to 2034 then \$45.2 million a year for nine years and \$1 million a year until it eventually transferred the road system to Victoria. Citylink pays the concession fees by issuing to Victoria financial instruments known as concession notes, which entitle Victoria to claim payment at a later date after certain conditions are satisfied. Citylink claimed its concession fees as tax deductions in the 1996, 1997 and 1998 years of income. It claimed \$31.25 million in 1995-96 and \$95.6 million in both 1996-97 and 1997-98. Allowing the deductions would reduce to nil Citylink's taxable income for these years. The Commissioner of Taxation disallowed the deductions. The Federal Court dismissed an appeal but the Full Court of the Federal Court allowed an appeal by Citylink. The Commissioner appealed to the High Court.

The Commissioner contended that the Full Court erred in holding that the concession fees were deductible on two bases. First, the Commissioner submitted that the fees were not "incurred" in producing Citylink's assessable income in the relevant income years because Victoria's right to redeem the concession notes depended upon various conditions being satisfied, including some relating to traffic levels, revenue and cash flow. Citylink argued the fees were outgoings to produce income because Citylink was committed to make payments each June and December once City Link was in profit. Fees owed were referable to particular years of income even if the concession notes were not redeemed in that year. The Commissioner's second submission was that the concession fees were not deductible because they were outgoings of a capital nature, paid to secure to Citylink a profitable business structure. Citylink argued the fees were a periodic recurrent expense.

The High Court, by a 5-1 majority, dismissed the appeal and upheld the decision of the Full Court on both bases. First, the deduction was "incurred" in the relevant year of income because Citylink was subject to a contractual liability to pay the concession fees twice a year and this obligation did not depend on the commercial operating risks of City Link. It did not matter that Citylink paid the fees by issuing concession notes which it did not have to pay until a later date. Secondly, the High Court held that the concession fees were not of a capital nature as Citylink did not acquire permanent ownership rights over the roads or land. All rights revert to Victoria at the end of the concession period. Citylink's rights were to build, operate and derive profit from the roads for a set period of time. Unlike periodic payments on the purchase price of a capital asset, the concession fees are periodic licence fees for infrastructure from which Citylink derives income. Since the fees were "incurred" in the relevant income year, and were not of a capital nature, the Court held that they satisfied the test for deductibility at their full face value for each of the income years in which they were claimed as deductions.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*