



HIGH COURT OF AUSTRALIA

3 December 2014

COMMISSIONER OF TAXATION v MBI PROPERTIES PTY LTD

[2014] HCA 49

Today the High Court unanimously allowed an appeal from a decision of the Full Court of the Federal Court of Australia, and held that the respondent's assumption of a lessor's rights and obligations following its purchase of premises, subject to an existing lease, involved the making of supplies which were neither taxable supplies nor GST-free supplies. The making of those supplies subjected the respondent to assessment for GST under s 135-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act").

Section 135-5 of the GST Act sets out the circumstances in which the recipient of a supply of a going concern is subject to liability for GST under the "increasing adjustment" for which that section provides. That increasing adjustment applies where an entity is the recipient of a supply of a going concern and the entity intends that some or all of the supplies made through the enterprise to which the supply relates will be supplies that are input taxed supplies, and that are therefore neither taxable supplies nor GST-free supplies.

The respondent, MBI Properties Pty Ltd, acquired three apartments in a hotel complex each of which was subject to a lease between the vendor, South Steyne Hotel Pty Ltd ("South Steyne"), and the operator of the hotel, Mirvac Management Ltd ("MML"). The respondent, on acquiring the rights of the lessor, became the recipient of a supply of a going concern. The Commissioner assessed the respondent to GST on the basis of it having an increasing adjustment under s 135-5. On disallowance of its objection to that decision, the respondent appealed to the Federal Court. At first instance, the respondent's appeal was dismissed, with the primary judge accepting the Commissioner's argument that the continuation of the apartment leases resulted in a continuation of an input taxed supply of residential premises by way of lease from South Steyne to MML. The Full Court allowed the respondent's appeal, holding that the only relevant supply occurred, and was completed, on the grant of the leases by South Steyne to MML and, therefore, there was no input taxed supply which the respondent could have intended would be made through the enterprise it acquired from South Steyne as a going concern.

Allowing the appeal, the High Court held that each apartment lease, as an executory contract, obliged the respondent to give MML use and occupation of the apartment throughout the term of the lease in consideration for the periodic payment of rent. The respondent's observance of this continuing obligation was properly characterised as an intended supply of residential premises by way of lease by the respondent to MML which was input taxed under s 40-35 of the GST Act. The Court also rejected the respondent's argument, raised by a notice of contention, that no increasing adjustment could be calculated in accordance with s 135-5 because the rent paid by MML was exclusively the price for the grant of the lease by South Steyne to MML and could not also be the price for the supply made by the respondent to MML. The respondent was therefore subject to assessment for GST under s 135-5 of the GST Act.

- *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.*

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