

State “social” activities an enterprise

**DEPARTMENT OF TRANSPORT (VICTORIA) V COMMISSIONER OF TAXATION [2009]
FCA 1209.**



INTRODUCTION

*Secretary to the Department of Transport (Victoria) v Commissioner of Taxation*¹ considers the ability of a state government department, in this case the Victorian Department of Transport (**Taxpayer**), to claim input tax credits in respect of a subsidy paid either to or on behalf of members of the community, who purchase and consume services provided by third parties, which services are themselves subject to the payment of GST.

BACKGROUND FACTS

Taxis in Victoria are operated according to the terms and conditions of a licence issued under the *Transport Act 1983* (Vic).² The Taxpayer administers these licences. The “Multi Purpose Taxi Program” (**MPTP**) provides a 50% subsidy of taxi fees for Victorians who suffer certain disabilities up to specified maximums. These Victorians become MPTP members. There is no distinction between journeys made for private use and those with a business purpose. It is a requirement of the licences that taxis be fitted out to facilitate this program.

The fare payable by a MPTP member is equal to the taxi fare minus the subsidy. The subsidy is paid to the taxi operator by the Taxpayer, or if the MPTP member paid the entire fee, to the MPTP member.

In effect, the Taxpayer pays half the fare and half the GST.

The Taxpayer is registered for GST. Usually the MPTP member is not registered. The Taxpayer’s case against the Commissioner of Taxation (**Commissioner**) was brought on a general basis in relation

to the operation of the MPTP between October 2006 and April 2007.

RELEVANT LEGISLATION

Transport Act

By Victorian legislation one of the functions of the Taxpayer is to provide transport services including the licensing and operating of taxicabs.³

The Transport Act defines a “taxicab” and imposes the requirement that the drivers of the taxicabs be licensed.⁴

A New Tax System (Goods and Services Tax) Act 1999

A taxable supply arises where a business supplies goods or services in the course of carrying on an enterprise to its customers in accordance with the requirements of s 9-6 of the *A New Tax System (Goods and Services Tax) Act 1999* (**GST Act**). In these circumstances the supplier accounts for the GST. If the recipient is a business, it will be able to claim an input tax credit for the amount of GST it has paid to the supplier for the goods or services. These credits are then offset against GST on goods or services received by the recipient from its own customers. Business entities are the collectors of GST receiving an amount representing GST but not necessarily keeping it. When a business is required to pay GST, it gets a credit for the amount paid. The burden of GST falls on the private consumer who does not receive credit for the GST it pays.⁵

The two central concepts of GST are “supply,” and “acquisition”. These terms are to be interpreted widely.⁶

For an entity to make a creditable acquisition under the GST Act, each element of s 11-5 of the GST Act must be satisfied. You acquire anything solely or partly for a creditable purpose; and

- (a) The supply of the thing to you is a taxable supply; and
- (b) You provide, or are liable to provide, consideration for the supply; and
- (c) You are registered, or required to be registered.

According to s 11-10(1), an acquisition is “any form of acquisition whatsoever”.

According to s 11-10(2), “an acquisition” includes:

- (a) an acquisition of goods;
- (b) an acquisition of services;
- (c) ...
- (d) ...
- (e) acceptance of a grant, transfer, assignment or surrender of any right;
- (f) ...
- (g) an acquisition of a right to require another person:
 - (i) to do anything; or
 - (ii) to re refrain from an act; or
 - (iii) to tolerate an act or situation;
- (h) any combination of any two or more of the matters referred to in paragraphs (a) to (g).

The acquisition must also be for a “creditable purpose”.⁷ According to s 11-15 of the GST Act, “You acquire a thing for a creditable purpose to the extent that you acquire it in carrying on your enterprise”.

ISSUES BEFORE THE COURT

Was the Taxpayer entitled to input tax credits for the GST component of the payments made to taxi operators under the MPTP arrangements between October 2006 and April 2007?

The Taxpayer argued that it acquired the right as against the taxi operator to ensure that the MPTP was implemented with the cooperation or by the services of the taxi operator.

The Commissioner's initial argument was that the Taxpayer did not acquire anything. Subsequently the Commissioner altered his position: the Taxpayer acquired the obligation or right through licensing to require that the taxi operator complied with the MPTP, and not when payments were made to the taxi operators under the MPTP. This argument was rejected by Gordon J because the construction of the GST Act relied upon by the Commissioner ignored the express words of the GST Act. As a result, the construction did not give the Act a "practical and fair business operation"⁸ and would create anomalies in the ability to claim input tax credits.

Before addressing the issues of the case, Gordon J noted that it required that application of terms in the GST Act that usually operate in a commercial setting. In this case, however, the issues required application of the GST Act to a governmental setting in which a Victorian executive department (the Department of Transport) administered a program designed to give relief to disabled persons. The program was administered through the imposition of licences and licensing conditions as opposed to commercial bargaining of the kind that is the most common application of the GST Act. It was not submitted that the GST Act cannot apply to the dealings of a state government.

Acquisition by the Taxpayer

Gordon J, found the following applicable principles:

1. An entity is entitled to an input tax credits in respect of creditable acquisitions (s 11-20).
2. A creditable acquisition will occur when:
 - (i) an "entity" taxpayer is registered; and

- (ii) makes an acquisition for a creditable purpose arising from
 - (iii) a supply to that entity which is a taxable supply;
 - (iv) for which the entity does or is obliged to provide consideration,
3. An acquisition will be made for a creditable purpose to the extent that it is acquired in carrying on the entity's enterprise.⁹
 4. An acquisition can include the acquisition of services or the acquisition of a right to require another person to do anything, refrain from an act or tolerate an act or situation.¹⁰

DECISION OF THE FEDERAL COURT

The Federal Court found for the Taxpayer, dismissing the Commissioner's arguments in full.

Gordon J held that Taxpayer may have acquired rights in the form of issuing licences to taxi operators. That is, the taxi operator applies for a licence, pays a licence fee, is granted a licence and is required to operate in accordance with that licence. Therefore, it could be asserted that, from the Taxpayer's perspective, it acquired rights within s 11-10(2)(g) of the GST Act. However Gordon J found this was not the relevant acquisition.

“ ... the issues required application of the GST Act to a governmental setting in which a Victorian executive department administered a program designed to give relief to disabled persons. ”

She gave approval to the following statement from *Customs and Excise Commissioner v Redrow Group Plc.*¹¹

“[t]he grant of such a right is itself a supply of services”.

5. The concept of taxable supply and acquisition are related. In other words, a taxpayer makes an acquisition if the taxpayer is the recipient of the supply. As a result, to determine the eligibility of entitlement to input tax credits, the relevant perspective is the standpoint of the entity.
6. There is nothing in the GST Act or the explanatory material to prevent one set of acts constituting two or more supplies. This may include “the right to have goods delivered or services rendered to a third party where the grant of such a right is itself a supply of services”.¹²
7. The GST Act should be regarded as a “practical business tax”.¹³

Her Honour held that the Taxpayer acquired through the licence from the taxi operator a service, the carriage of an MPTP member. This carriage is acquired by the Taxpayer through the implementation of the MPTP. The Taxpayer acquires this service for consideration as it agrees to pay the taxi operator to carry the MPTP member. The taxable supply to the Taxpayer is the carriage of that MPTP member; that is what it acquired. The supply by the taxi operator is a supply to both the MPTP member and to the Taxpayer through the transport of a disabled person for part of the taxi fare and other fees.

The Taxpayer acts as an enterprise, which acquires a service, being the transporting of MPTP members by taxi operators, for a creditable purpose, the carrying on of the business of the Taxpayer which is a taxable supply made to the Taxpayer for consideration, the payment under the MPTP.

The Commissioner's submissions sought to deny this conclusion first on the basis that the question of taxable supply for consideration must be determined “from the perspective of the supplier, as it is the entity which has the liability for the GST.”¹⁴

Secondly, it was denied on the basis that there was no contract between any taxi operator and the Taxpayer for the carriage of any passenger, that no consideration was paid and that there was an absence of control by the Taxpayer over the supply. Finally, the Commissioner submitted that the payment by the Taxpayer was analogous to credit and charge card arrangements.

The GST Act requires that the questions of supply and acquisition are looked at from the taxpayer's point of view, in this case the Taxpayer. The Commissioner accepted that there was a taxable supply but that the supply was from the taxi operator to the MPTP member. Gordon J found this characterisation led to error, it is a characterisation of one set of acts from one incorrect perspective.

Having identified the payment in question, the MPTP subsidy, three questions were asked by Gordon, J following Lord Millet in *Redrow*.¹⁵

1. Did the Taxpayer obtain anything used or to be used for the purposes of their enterprise in return for that payment?
2. Was the thing that it acquired a taxable supply to it?
3. Did the Taxpayer provide consideration for that which it acquired?

The answer to all three questions was yes. The taxable supply (question 2) was that after the production of the MPTP card issue by the Taxpayer, the taxi operator carried the member based on the terms and conditions specified in the taxi operator's licence. The consideration provided by the Taxpayer (question 3) was the part it paid of the taxi fare.

Gordon J pointed out, that had the GST Act been applied to the same set of acts from the perspective of the MPTP member, the answer to the above questions may have been different as one set of acts may constitute two or more different supplies of services of acquisitions. Each may have been a taxable supply as in this case. In this instance, however, the GST consequences are different for each supply.

Gordon J found by taking the MPTP Member, the taxi operator may be understood as accepting a standing offer made by the Taxpayer to pay part of the fare incurred by such a passenger. "[I]f a MPTP member is carried by a taxicab using their MPTP card, without some

contrary provisions in the legislation, a debt is owed by the [Department] to the taxicab operator."¹⁶

Gordon J specifically rejected the Commissioner's submissions that there must be "some control" over the supply made to a payer in a tripartite arrangement.¹⁷

COMMENT AND CONCLUSION

The case of *Secretary to the Department of Transport (Victoria) v Commissioner of Taxation* require the Federal Court to consider whether Taxpayer entitled to input tax credits for the GST component of the payments made to taxi operators under the MPTP. The MPTP operates in Victoria to provide Victorians who suffer certain disabilities with a subsidy of up to 50% of their taxi fares. In many cases, although the Taxpayer is registered for GST, the MPTP members are not.

The Federal Court held that the Taxpayer was entitled to input tax credits under s 11-1 of the GST Act for the GST component of the payments made to taxi operators under the MPTP from October 2006 to April 2007.¹⁸

In reaching this conclusion, Gordon J accepted that the same sort of facts could give rise to two separate taxable supplies: that their could be different GST outcomes in respect of those separate supplies, indeed one might not be taxable.

Her Honour also accepted that that the activities of a state government department which on our view at least might be considered "social welfare" in nature constitute an "enterprise" for the purposes of the GST Act.

The combined effect of these conclusions is that a transaction which would be generally speaking private and therefore no input tax credit is available is converted to one where there is an input tax credit available (to the State of Victoria) for effectively half the purchase price.

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Reference notes

- 1 [2009] FCA 1209.
- 2 *Transport Act 1983 (Vic)* ss 86, 87, 139, 144, 158.
- 3 *Above n 2*, at s 4(2)(a).
- 4 *Above n 2*, at s 86,139.

5 *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553 at [10]-[13] and [20]-[23].

6 *Explanatory memorandum to the GST Act*, at [3.2.1] and [3.6].

7 *Above n 5*, at [20].

8 *Brady King Pty Ltd v Federal Commissioner of Taxation* (2008) 168 FCR 558 at [24]-[25].

9 *Section 11-15 GST Act*.

10 *Section 11-10 GST Act*.

11 *Commissioner of Customs & Excise v Redrow Group Plc* [1999] 1 WLR 408 at 418.

12 *Ibid*.

13 *Above n 11*, at 418.

14 *Above n 1*, at [54].

15 *Above n 11*, at 418.

16 *Above n 1*, at [61].

17 *Above n 1*, at [61].

18 *Above n 1*, at [73].