Case note

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AP GROUP: NO QUESTIONS OF LAW RAISED ON APPEAL

The recent Full Federal Court decision in *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 (*AP Group*) concerns two concepts that are fundamental to the GST: the meaning of "supply" under s 9-10 and the meaning of "supply for consideration" under s 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act).[1] The GST issues in this case arose in the context of "incentive payments" made by various vehicle manufacturers to the taxpayer, AP Group Limited (referred to as AP Group or the Taxpayer), which operated car dealerships across Australia. The dispute between the Taxpayer and the Commissioner was as to whether those payments were consideration for a supply for GST purposes.

The case was an appeal and cross-appeal from the earlier decision of the Administrative Appeals Tribunal (AAT) in *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 (Tribunal decision). As the Tribunal decision was endorsed by the Full Federal Court, it is discussed in some detail below.

Ultimately, both the appeal and cross-appeal were unsuccessful, as no valid questions of law were raised by the parties.[2] Consequently, the Full Court had no jurisdiction to make the orders requested. However, the Full Court indicated that, in any event, their Honours agreed with the conclusions of the AAT.[3] Some qualifications were made by Bromberg J as to his reasons for disallowing the cross-appeal (also discussed below).

While some of the comments made by the court were obiter, the decision includes an illuminative discussion of the correct interpretation of "supply for consideration". In the course of the discussion, their Honours recognised that the line between what is and isn't a "supply for consideration" for GST purposes is a fine one and is often difficult to discern, and requires a balance between a strict interpretation of the text of the provisions and an outcome that is sensible from a practical and economic perspective.

The case also illustrates that despite the raft of cases that have been decided in recent years on similar issues, including *American Express International Inc v Commissioner of Taxation* (2009) 73 ATR 173 (*American Express*), *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 (*Reliance Carpet*), *Commissioner of Taxation v Secretary to the Department of Transport (Victoria) Inc* (2010) 188 FCR 167 (*DOT*), *Commissioner of Taxation v Qantas Airways Ltd* (2012) 291 ALR 653 (*Qantas*) and *TT-Line Co Pty Ltd v Commissioner of Taxation* (2009) 181 FCR 400 (*TT-Line*), there is no universally applicable formula that answers the question of what constitutes a supply, or what the necessary nexus is between a supply and consideration in order for GST consequences to arise. The outcomes and, indeed, the correct approach to applying the relevant provisions, will always depend on the specific factual circumstances in any given case.

THE FACTS

The Taxpayer represented a group of companies that operated various motor vehicle dealerships across Australia. In the course of its business, AP Group received incentive payments from motor vehicle manufacturers with which it had dealership agreements, including Toyota Motor Corporation Australia Limited (Toyota), Ford Motor Company of Australia Limited (Ford) and Subaru (Aus) Pty Ltd (Subaru).

[1] All references to Divisions and sections are to Divisions and sections of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), unless otherwise stated.

[2] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [54].

[3] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [54].

There were numerous arrangements between the parties under which these payments were made, and not all were canvassed in the AAT or Federal Court proceedings.[4] The AAT addressed five types of arrangements and, the Federal Court, only four. For present purposes, those four included:

(a) Toyota "fleet rebates";
(b) Toyota "run-out model support payments";
(c) Ford "retail target incentive payments"; and
(d) Subaru "wholesale target incentive payments".[5]

The Full Court's decision includes a detailed analysis of these arrangements. It is therefore necessary to describe them in some detail.

THE ARRANGEMENTS

(a) *Toyota Fleet Rebates*[6]

Under this arrangement, the Taxpayer agreed to sell vehicles to specific classes of customers for a discounted retail price. This price varied, depending on whether the customer belonged to the Platinum, Gold or Silver category.

In most cases, the Taxpayer would acquire vehicles from the manufacturer specifically for fleet purposes, and would be compensated for the discounted retail price by acquiring the vehicles at a discounted wholesale price. In such cases, no rebate was provided and no GST issues arise.

In some cases, however, (and relevantly, for present purposes) vehicles that were acquired for sale to private customers (ie which were not acquired from the manufacturer at a discount) would be sold to fleet customers at the discounted retail price. In order to compensate for the discount, the manufacturer would pay to the Taxpayer a rebate or incentive payment.

(b) *Toyota Run-Out Model Support Payments*[7]

The purpose of this arrangement was to assist the Taxpayer to reduce its floor stock of older vehicles prior to the introduction of newer model vehicles. Once the Taxpayer sold the relevant vehicles, the Taxpayer would notify Toyota and Toyota would arrange for payment of the rebate.

There was no requirement, under this arrangement, for the Taxpayer to pass on the rebate or any discount to the customer.

(c) *Ford Retail Target Incentive Payments*[8]

Under this program, Ford would pay an incentive to dealers if it met certain monthly or quarterly sales targets. These targets were determined by each dealer's size and past performance. The targets related to the volume of vehicles sold and delivered and not the value of the vehicles. Additionally, only sales to eligible customers, that is "retail" or "business fleet plan" customers, were included.

Following the incentive period, Ford would issue AP Group with a tax invoice plus 10% GST for the payment which shortly followed, if its target had been reached.

(d) *Subaru Wholesale Target Incentive Payments*[9]

Under this arrangement, Subaru would make an incentive payment to the Taxpayer for meeting wholesale ordering targets within a period. It stipulated the target at 70% of the maximum ordering entitlement of the dealer, again based on the size and past performance of each dealer.

In respect of each of the arrangements, the Taxpayer initially treated the payments as consideration for supplies made by the Taxpayer to the manufacturers, giving rise to a GST liability

[4] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [3].

[5] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [4].

[6] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [22]-[28].

[7] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [29]-[38].

[8] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [49]-[60].

[9] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [65]-[73].

for the Taxpayer and an input tax credit entitlement for the manufacturers. Subsequently, AP Group re-considered its position that GST was payable in respect of the payments and sought a GST refund from the Commissioner.

The Commissioner disagreed with the Taxpayer's revised position and made an assessment on the basis that the payments would continue to be subject to GST, as the payment was made for, and in connection with, supplies made by the Taxpayer to the manufacturers. The Taxpayer objected to this assessment. The Commissioner disallowed the objection and the Taxpayer sought a review of the objection decision before the AAT.

THE RELEVANT LEGISLATION

GST is payable on taxable supplies. The key question that arises on the present facts is whether the incentive payments were made for supplies.

There are four elements of a taxable supply set out in s 9-5, which states, as follows:

9-5 Taxable supplies

You make a taxable supply if:
(a) you make the supply for *consideration; and
(b) the supply is made in the course or furtherance of an *enterprise that you *carry on;
(c) the supply is *connected with Australia; and
(d) you are *registered, or *required to be registered.

However, the supply is not a *taxable supply to the extent that it is *GST-free or *input taxed.

The meaning of "for" in "supply for consideration", as set out in s 9-5(a), was of central importance in this case.[10]

Relevantly, consideration is defined in s 9-15 as follows:

9-15 Consideration
(1) ***Consideration*** includes:
(a) any payment, or any act or forbearance, in connection with a supply of anything; and
(b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.

In order to determine whether a supply is made for consideration (for the purposes of s 9-5(a)), and whether the payment is made in connection with the supply (for the purposes of s 9-15(1)(a)), it is necessary to identify one or more potential supplies. Section 9-10 outlines what constitutes a supply as follows:

9-10 Meaning of supply
(1) A ***supply*** is any form of supply whatsoever.
(2) Without limiting subsection (1), supply includes any of these:
(a) a supply of goods;
(b) a supply of services;
(c) a provision of advice or information;
(d) a grant, assignment or surrender of *real property;
(e) a creation, grant, transfer, assignment or surrender of any right;
(f) a *financial supply;
(g) an entry into, or release from, an obligation:
i. to do anything; or
ii. to refrain from an act; or
iii. to tolerate an act or situation;
(h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).

In the present case, the issue arose as to whether each incentive payment was made for and in connection with a supply from the Taxpayer to the retail customer, or for and in connection with a supply from the Taxpayer to the vehicle manufacturers.

[10] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [31]-[33].

THE COMMISSIONER'S ARGUMENT

The Commissioner put forward two alternative arguments to show that the incentive payments were consideration for supplies. The Commissioner's first argument was that the Taxpayer made supplies to the manufacturers for which the incentive payments were consideration.[11] He argued that these supplies consisted of obligations performed under the various dealer agreements. These included "to advertise and promote products", "to comply with rules and conditions imposed by the manufacturer in relation to such issues as ordering product and recording and/or notifying sales", and "to provide full published discounts to customers".[12] The Commissioner contended that given the broad definition of supply under s 9-10 of the GST Act as "any form of supply whatsoever", the obligations amounted to supplies to the manufacturer.[13]

In this respect, the Commissioner argued that it was not helpful to take into account the "essence" or "sole purpose" of the transaction, as while this has been relevant in the past in determining whether a particular transaction is comprised of one supply or two, it is not relevant to the question of whether there is any supply at all.[14]

The Commissioner argued that this outcome is supported by the decision in the *DOT* case. In that case, the Full Federal Court found that in providing travel to disabled passengers under a government program, taxi drivers made a supply to both the passenger and the government body, thereby enabling the government body to claim input tax credits in respect of the government subsidies paid under the program. The Commissioner argued that, similarly, supplies made by the Taxpayer to retail customers can also be viewed as supplies made to the vehicle manufacturers.

Further, the Commissioner argued, the incentive payments were made "in connection with" those supplies, thereby satisfying the requirements of s 9-5 of the GST Act and giving rise to a GST liability for the Taxpayer.

The Commissioner's second argument was that, in selling the vehicles, the Taxpayer made supplies to its customers for which the Toyota fleet rebate, the Toyota run-out model support payment and the Ford retail target incentive payment, were consideration. The Commissioner did not make this argument in respect to the Subaru wholesale target incentive payments. Essentially, he argued, the incentive payments were amounts of third party consideration paid by the manufacturers for and in connection with supplies made to the retail customers.

In support of this argument, the Commissioner referred to the *TT-Line* case. In that case, eligible passengers of a ferry service operated by TT-Line were entitled to rebates by the Commonwealth. In the relevant example, the rebate was paid by the Commonwealth directly to TT-Line, and the passenger paid the balance of the fare.[15] Edmonds J, with whom Perram J agreed, stated:

> The consideration for the supply of the transport services to Mr Egan included not only what he paid, but the amount of the rebate he was granted by the appellant, which rebate was paid by the Commonwealth to the appellant by way of reimbursement.[16]

The Commissioner argued that similarly, in the present circumstances, where a Fleet Rebate, Run-Out Model Payment or Retail Target Payment was made with reference to a sale by the Taxpayer of a motor vehicle, the consideration received by the manufacturer for that motor vehicle included both the amount paid by the retail customer and the incentive payment.

THE TAXPAYER'S ARGUMENT

The Taxpayer argued that the incentive payments were not consideration for supplies and did not give rise to any GST consequences. It argued that no relevant supply was made to the manufacturers, and

[11] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [75].

[12] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [80].

[13] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [81].

[14] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [83].

[15] *TT-Line Co Pty Ltd v Commissioner of Taxation* (2009) 181 FCR 167 at [95]-[96].

[16] *TT-Line Co Pty Ltd v Commissioner of Taxation* (2009) 181 FCR 167 at [97].

that the "essence or sole purpose" of the transaction should be taken into account, so as to avoid a "chaotic vista" where, as paraphrased by the Tribunal, "everything is a supply, everything is consideration, and everything is connected with everything".[17]

The Taxpayer further argued that, while it undoubtedly made supplies to its retail customers, the incentive payments did not constitute consideration "for" and "in connection with" those or any supplies. It argued that the payments are "properly characterised as third party rebates", and cannot be treated as "consideration" unless they are "disengaged from that status".

In the Taxpayer's view, the *TT-Line* case should be distinguished, on the following grounds:

- in *TT-Line*, the customer, not the ferry operator, was entitled to the rebate, whereas here it is the Taxpayer who receives the payment;
- the Taxpayer's customers, unlike the passenger in *TT-Line*, are "rarely" or "never" aware of the amount of the payment made to the Taxpayer; and
- the passenger in *TT-Line* had the option of paying the full price for the travel and claiming the rebate from the government, but the Taxpayer's customer has no corresponding option.[18]

Consequently, the Taxpayer argued, the *TT-Line* case did not support the proposition that the incentive payments constituted third party consideration on the present facts.

The Taxpayer also pointed to the fact that the retail customer may not be aware that an incentive payment is paid, or the amount of the incentive payment, making it unlikely that the incentive payment is consideration for a supply received by the retail customer.

THE TRIBUNAL'S DECISION

The Tribunal (constituted by Deputy President Frost and Deputy President Deutsch) rejected the Commissioner's argument that the relevant obligations entered into under the dealer agreements constituted supplies for the purposes of s 9-10 of the GST, notwithstanding the breadth of that definition. The AAT stated:

> we do not think that the Applicant's acceptance of the obligations or the making of the promises is properly viewed as the making of supplies to the manufacturers. Instead, they are part of the foundation underpinning the relationships, the background to the bargain the parties have made.[19]

The AAT also rejected the Commissioner's argument that the "essence" and "purpose" is irrelevant to determining whether a supply has been made, stating that "there is an air of unreality" in the Commissioner's argument. In this regard, the AAT stated:

> It seems to us that any criteria that are relevant to one stage are quite likely to be relevant to the other. And having regard to "essence" and "purpose" throughout the enquiry is likely to lead to a GST outcome that reflects the realities of the commercial arrangement, rather than the "chaotic vista" that [counsel for the Taxpayer] predicted, where everything is a supply, everything is consideration, and everything is connected with everything.[20]

The Tribunal then went on to explain that in any case, even if supplies were made from the Taxpayer to the manufacturers, there is no "nexus" between the incentive payments and any such "supplies" that would amount to a supply for consideration, as the Taxpayer was merely carrying on its business in the same manner that it would have done, regardless of whether the incentive payments were made. In this respect, the Tribunal stated:

> The Commissioner's submissions do not grapple with the indisputable truth that, on his argument, the [AP Group] always carries on its business in a particular way (as it has agreed with the manufacturers to do), but it only gets paid for doing so in circumstances which warrant the payment of an incentive; otherwise the supply is provided for free.[21]

[17] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [84].

[18] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [98].

[19] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [85].

[20] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [84].

[21] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [86].

The Tribunal also rejected the Commissioner's argument that this case was analogous to the *DOT* case. The Tribunal explained:

> The effect of this submission is that the supply of a vehicle to the Applicant's retail customer is at the same time the supply, by the Applicant to the manufacturer, of the service of supplying the vehicle to the customer. It is difficult, with respect, to imagine a more tortured analysis of what is a fundamentally simple transaction, a sale of goods.[22]

No further analysis is provided as to why the case is distinguishable from the outcome in the *DOT* case.

The Tribunal preferred the Commissioner's second argument, that the incentive payments were sufficiently connected to supplies by the Taxpayer to its retail customers. It was obviously the case that the sale of the vehicles to those retail customers constituted supplies for the purposes of s 9-10 of the GST Act. Further, s 9-15(2) contemplates that consideration may be provided by someone other than the recipient of the supply and that, further, the recipient of the supply need not know that the third party consideration has been paid in respect of the supply it has received. The question for the Tribunal was whether the payments could be properly characterised as consideration "for those supplies" for the purposes of s 9-5 of the GST Act and whether the payments were sufficiently "in connection with" those supplies for the purposes of s 9-15.

In this regard, the Tribunal rejected the Taxpayer's argument that the payments cannot be characterised as both "third party rebates" and amounts of consideration. The Tribunal referred to the following passage of *Reliance Carpet*:

> The circumstance that the deposit forfeited to the taxpayer had various characteristics does not mean that the taxpayer may fix upon such one or more of these characteristics as it selects to demonstrate that there was no taxable supply. It is sufficient for the Commissioner's case that the presence of one or more of these characteristics satisfies the criterion of "consideration" for the application of the GST provisions respecting a "taxable supply".[23]

The Tribunal therefore found that the "third party rebate" label was irrelevant, as the relevant question remains whether the payment fits the statutory definition of consideration.[24]

The argument put forward by the Taxpayer that the *TT-Line* case was distinguishable in the present circumstances was rejected by the Tribunal, which considered that none of the distinguishing factors pointed to by the Taxpayer mattered.[25]

The Tribunal also rejected the Taxpayer's argument that the lack of awareness of the retail customer suggests the incentive payments are not consideration for supplies received by the retail customers, and agreed with the following submission of the Commissioner:

> The GST Act does not however manifest any intention that the recipient of a supply must have knowledge of **all** the consideration that is provided in connection with a particular supply. As s 9-15(2) expressly provides, consideration May be provided by someone other than the recipient of the supply. To limit the concept of consideration to only that which the recipient "knows", is to recognise a limitation on the operation of s 9-15 that is simply not there.[26]

In other words, in the Tribunal's view, there is nothing in the GST Act to suggest that a recipient of a supply must be aware of the amount of consideration received by the supplier for the supply (though, presumably, a supplier would be required to disclose the full amount on a tax invoice).

Ultimately, the Tribunal found that only two of the arrangements gave rise to incentive payments that were "in connection with" the supply of the vehicle to the customer for the purposes of s 9-15: the

[22] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [88].

[23] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [93].

[24] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [93].

[25] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [99].

[26] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [100].

Fleet Rebate and Run-out Payment. The Tribunal found that the supplies made by the Taxpayer to the retail customers triggered the incentive payments, thus establishing the requisite nexus between the supply and the consideration.[27]

In reaching this conclusion, the Tribunal referred to the following comments of Emmett J in the *American Express* case:

> The phrase **in connection with** signifies, in its broadest sense, any relationship between two subject matters, no matter how remote. The phrase is capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote.[28]

While the Tribunal acknowledged that a "tenuous" or "remote" connection will not constitute consideration for a supply,[29] it considered that the nexus between the Toyota fleet rebate and run-out support payments and the individual supplies of vehicles by the Taxpayer to the retail customers was "direct and immediate". In this regard, the Tribunal stated:

> **That is because the supply of the vehicle is the very act that triggers the payment of the rebate.** Put simply, the consideration that [AP Group] received for the supply of a vehicle to a fleet customer comprised two components – the first component is the amount paid by the customer, and the second component is the amount received from Toyota as the "fleet rebate". Both components were paid for that supply, and together they form the consideration for the supply.[30] (emphasis added)

With regards to the Ford retail target incentive payment, the Tribunal found that it was a payment in connection with the "making of supplies generally"[31] rather than, with any one particular supply. The Tribunal considered the singular use of the word "supply" in s 9-15 as deliberate and understood it to mean that payments must concern a single supply. The Tribunal acknowledged that s 23 of the *Acts Interpretation Act 1901* provides that "unless the contrary intention appears … words in the singular number include the plural". However, it was found that the deliberate, singular use of the word "supply" found throughout Div 9 demonstrates a "contrary intention".[32]

The Tribunal's decision can be summarised as follows:

- No relevant supplies were made by the Taxpayer to the manufacturers.
- The Fleet Rebates and Run-out Model Payments were third party consideration for supplies made by the Taxpayer to the retail customers.
- The Retail Target Payments were not amounts of consideration "in connection with" the supply to the retail customer.
- The Wholesale Target Payments were not amounts of consideration "in connection with" the supply to the retail customer.

THE APPEAL AND CROSS APPEAL

The Taxpayer appealed and the Commissioner cross-appealed the Tribunal's decision to the Full Federal Court, arguing that "the Tribunal misconstrued and thus misapplied" the relevant statutory provisions.[33]

The Taxpayer contended that the Tribunal should have found that the Fleet Rebates and Run-out Model Payments were not consideration for the supply of vehicles to its retail customers. In particular, the Taxpayer noted that the payments were to reduce the price that the Taxpayer paid to Toyota, rather than being for, or having the requisite connection with, the subsequent sales to the retail customers. This is illustrated by the fact that the payments occur at the stage of the distribution chain prior to the sale to the retail customer.

[27] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [104].

[28] *American Express International Inc v Commissioner of Taxation* (2009) 73 ATR 173 at [55], *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [102].

[29] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [103].

[30] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [104].

[31] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [106].

[32] *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [108].

[33] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [11].

On this point, the Commissioner argued that these payments should have been found to be consideration for the supply of services by the Taxpayer to the manufacturers. However, the Commissioner argued in the alternative that if the relevant supplies were those made to the retail customers, the requisite connection existed between the incentive payments and those supplies.

The Taxpayer argued that the Tribunal did not sufficiently take into account the word "for" in the phrase "supply for consideration" in s 9-5(a), focussing instead on whether the payment was "in connection with" any supply. In particular, the Taxpayer pointed to the Tribunal's emphasis on the retail sales as a "trigger event", and argued that s 9-5 should not be engaged merely because the incentive payments would not have been made unless the subsequent sales occurred.[34]

The Commissioner's response to this was that, when considered alongside the definitions of supply and consideration, the word "for" has no work to do.[35] The Commissioner's argument relied on a substitution of the words "supply" and "consideration" with their statutory definitions so that the requirement can be understood as:

> You make [any form of supply whatsoever] for [any consideration, within the meaning given by sections 9-15 and 9-17 in connection with the supply or acquisition].[36]

In the Commissioner's cross-appeal, it was argued that the Retail Incentive Payment and the Wholesale Target Incentive Payment were likewise consideration for supplies of services by the Taxpayer to the manufacturers.

Under s 44(1) of the *Administrative Appeals Tribunal Act 1975*, a party to a proceeding before the Tribunal may appeal against the Tribunal's decision *on a question of law*. Of particular importance to the outcome of the case was the manner in which the parties identified the questions of law in the appeal and cross-appeal. As the manner in which these questions of law were articulated by the parties was determinative of the outcome of the case, it is necessary to consider them in some detail. They were described by the parties as follows:

(1) Whether, for the purposes of s 9-5 of the GST Act, the taxable consideration for a motor vehicle sold by AP Group to its end-customer was to be increased by including the amount of the fleet rebate paid to AP Group by the Australian manufacturer or distributor, in addition to the price for the vehicle that was contractually agreed upon between AP Group and its end-customers on which GST had been accounted in full.

(2) Whether for the purposes of s 9-5 of the GST Act the taxable consideration for a motor vehicle sold by AP Group to its end-customer was to be increased by including the amount of the Run-out Support Model Payment by the Australian manufacturer or distributor to AP Group, in addition to the price for the vehicle that was contractually agreed between AP group and its end-customers on which GST had been accounted in full.

(3) Whether the AAT erred in finding that in respect of Retail Target Incentive Payments paid by Ford to the applicant during the periods in issue:
   (a) the applicant made no "supply" within the meaning of s 9-10 of the GST Act to Ford; and
   (b) such payments were not "consideration" within the meaning of s 9-5(a) and 9-15 of the GST Act for any supply the applicant made to Ford.

(4) Whether the AAT erred in finding that in respect of Wholesale Target Incentive Payments paid by Subaru to the applicant during the periods in issue:
   (a) the applicant made no "supply" within the meaning of s 9-10 of the GST Act to Subaru;
   (b) such payments were not "consideration" within the meaning of s 9-5(a) and 9-15 of the GST Act for any supply the applicant made to Subaru.

[34] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [35].

[35] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [31].

[36] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [32].

THE FULL FEDERAL COURT DECISION

The Full Federal Court endorsed the decision of the Tribunal and dismissed both the appeal and cross-appeal. Edmonds and Jagot JJ gave a joint judgment while Bromberg J delivered separate reasons for judgment.

The court rejected the Commissioner's argument that the word "for" in s 9-5(a) has no work to do, finding that the substitution approach (extracted above) does not result in the omission of the word "for". The court provided the following description of the work that "for" has to do in the context of that subsection:

> "For", in this context, means "in order to obtain" (*Macquarie Dictionary Online*, item 3, *Oxford Dictionary Online* item 9(a)). The word "for" thus functions in the statutory description to identify the character of the connection which is required. **It ensures that not every connection between the giving of consideration and the provision satisfy the first condition of making a taxable supply. If it were otherwise, any form of connection of any character between the making of a supply and the payment of consideration would suffice**.[37] (emphasis added.)

The court acknowledged that in earlier cases, including in *Reliance*, *TT-Line*, *Department of Transport* and *Amex*, "the relevant question has been expressed in terms of the connection", but the analysis did not begin and end with that question.[38]

Rather, the nature and extent of the connection must be considered. The court found that the Tribunal had taken this proper approach and analysed the connection appropriately.

However, the court also rejected the Taxpayer's argument that the Tribunal overlooked the significance of the word "for" in s 9-5(a). Their Honours specifically noted that, while there may have been some emphasis on the subsequent retail sales as a "trigger event", the Tribunal's reasons indicate that it did not make its decision on the basis that "a mere temporal trigger would suffice".[39] In other words, the Tribunal did not simply apply a "but for test".[40] Consequently, the court considered that the Tribunal construed the section correctly and took the correct approach in its analysis.

The court was also satisfied that the Tribunal did not find that the supplies were made for consideration by taking the approach that "a connection of any nature" would result in "consideration for a supply". This was evident from the Tribunal's reasons, which recognised that such an approach would result in "chaos", as contended by the Taxpayer.[41]

Once it was concluded that the Tribunal had not misconstrued s 9-5, it followed that there was no question of law, identified by the Taxpayer, for the court to determine. The same difficulty arose for the Commissioner in respect of the cross-appeal. In this regard, the court states:

> It follows that to the extent that the AP Group's appeal relied on the notion that the Tribunal misconstrued s 9-5 by overlooking the requirement that the supply be for consideration there cannot be said to be any question of law which arises on the Tribunal's decision. This does not mean that the questions identified as questions of law do not arise, but it has the consequence that none of the questions involve the Tribunal's construction of s 9-5 of the GST Act. The Tribunal's construction of s 9-5 was orthodox and did not involve error. **The problem with the questions of law said to arise in the notices of appeal and cross-appeal are that each embraces potential questions of fact and law. By not identifying questions of law which, if answered in a particular way are capable of vitiating the Tribunal's decision, the parties (no doubt inadvertently) have failed to identify the proper jurisdictional foundation of the appeal and cross-appeal**.[42] (emphasis added.)

[37] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [33].

[38] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [34].

[39] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [35].

[40] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [35].

[41] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [36].

[42] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [37].

Similarly, while the case put forward by the Commissioner did involve questions of law, including "that the Tribunal misunderstood and thus failed to deal with the Commissioner's case as put to it and, in so doing, failed to consider relevant matters", the questions were not put to the court in this way in the notice of cross-appeal.[43]

The court also addressed the Taxpayer's argument that the facts, as found by the Tribunal, should have led to the outcome that neither the Fleet Rebates nor the Run-out Support Payments were consideration for a supply or in connection with a supply made by the Taxpayer to its retail customers. The Commissioner's argument that the nexus is sufficient, as the sale of the car "triggers" the rebate, was also considered. The court acknowledged the difficulty in answering these questions, stating that "the competing approaches reflect the different focus of the AP Group and the Commissioner".[44] The Taxpayer's approach is to consider the "overall relationship between the dealer and the manufacturer", in the context of which the Fleet Rebates are simply part of the "wider rules of engagement", while the Commissioner's approach focused on the specific transaction in respect of which the rebate is payable, and at that "level of particularity the fleet rebate payment is for the supply of a non-fleet car to a fleet customer".[45]

The court acknowledged "this issue is not easy to resolve",[46] but provided the following guidance as to how to approach the analysis and how it reached its conclusions on the present facts:

> Ultimately, selection of the appropriate level of generality or particularity at which the assessment is to be carried out is fact-dependent. The critical facts include the nature of the supply said to be involved. This flows from s 9-5 which is concerned with each supply. On the facts of the present case, where there is no doubt that the sale by the dealer of a car to a customer (specifically, the sale of a non-fleet car to a fleet customer) causes or is the trigger for the making of a payment by Toyota to the dealer, it is necessary in terms of the statute to ask whether the dealer made that particular supply for consideration. The appropriate level for the assessment is the particular supply of the car in question by the dealer and the payment which that supply triggers. The price paid by the customer is clearly consideration for the supply. But so too is the fleet rebate paid by Toyota to the dealer. The factors on which AP Group relied to avoid this result are not as persuasive as those which point to it.[47]

Consequently, the court agreed with the Tribunal's conclusion that the relevant supply was the supply made by the Taxpayer to the retail customer and that the Fleet Rebates were third party consideration for that supply.

The court accepted the Taxpayer's argument that "all aspects of the arrangement between the dealer, the manufacturer and the customer had to be considered".[48] However, the court considered that the Tribunal did take those matters into account. Despite the Tribunal's comment at [99] that certain factors (ie the distinguishing features between the *TT-Line* case and the present facts) "did not matter", the court was satisfied that there was no failure to consider those matters, but rather, a finding by the Tribunal that upon consideration, they did not carry weight.[49]

The court agreed with the Tribunal that the fact that the incentive payments were considered to be in the nature of "rebates" by the parties to the transaction did not assist with the characterisation of the payments under the law. How the parties choose to characterise the payment, for example, in describing it in the contract, is not determinative.[50] The court also agreed that while it was a factor to

[43] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [37].

[44] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [41].

[45] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [41].

[46] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [41].

[47] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [43].

[48] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [42].

[49] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [42].

[50] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [42], [44].

be considered, it was not determinative that the recipient of the supply (the retail customer) may not have been aware of the amount of any third party consideration paid by the manufacturer.[51]

The court took a similar view in respect of the Run-Out Payments, in that the appropriate level of assessment was the sale of the particular car which prompted the payment from Toyota. This was the case despite the fact that the Taxpayer was not required to pass on the benefit of any "discount" to the retail customer. The supply of the vehicle "triggered" the payments to the Taxpayer and the Taxpayer received consideration for the supply from two sources: the retail customer and Toyota. Consequently, the incentive payments were "for" and "in connection with" those supplies.[52]

From a practical perspective, the court acknowledged that this will result in a requirement for amounts of consideration, including any rebate paid by the manufacturer, to be included in the tax invoice to the retail recipient. However, the court did not consider this to be an onerous requirement.[53]

For similar reasons, with respect to the Commissioner's cross-appeal, the court rejected the Commissioner's argument that the Retail Target Payments and Wholesale Target Payments were consideration in connection with supplies made to the manufacturers by the Taxpayer. The court explained its approach as follows:

> The resolution of the issues again turns on the selection of the appropriate level of generality or particularity with which the acts said to constitute supplies are to be considered. In contrast to the "fleet rebates" and "run-out model support" payments none of these other payments are triggered by the sale of a particular car. The payments are part of wider programs in which dealers would have a strong incentive to participate but which do not depend on the sale of any particular car in any particular way. The conduct which the payments act to encourage is conduct relating to the overall management of the business enterprise comprised in the dealership, including sound ordering practices and clearance of old stock to make way for new stock, to the presumed mutual benefit of the dealer and the manufacturer. This indicates that the required focus is the overall relationship between the dealer and the manufacturer. Whether there are supplies for consideration is to be assessed in that context – which is precisely what the Tribunal did.[54]

Against the backdrop of this "overall relationship between the dealer and the manufacturer," the court found that "the so-called supplies for consideration identified by the Commissioner are nothing more that the encouragement of an overall business relationship between the manufacturer and the dealer to the mutual benefit of both."[55] The court highlighted that unlike the Toyota payments, these incentive payments formed part of a wider program which did not depend on the sale of any particular car, but rather encouraged sound management practices.[56]

The court was satisfied that this was consistent with the approach taken by the Tribunal. In rejecting the Commissioner's arguments, their Honours found that:

> the Tribunal's reasons as a whole disclose that it was aware of both the arrangements between the dealers and the manufacturers as a whole and the Commissioner's arguments. Although the Tribunal expressed its conclusions in terms of the "rulebook by which the game is to be played" at [85] it is apparent that the Tribunal well understood that the Commissioner was relying on the particular obligations which the dealers accepted in support of the contentions … The Tribunal's real point was that these arrangements reflect the overall relationship between the dealer and the manufacturer which always exists … The Tribunal thus selected the correct level of focus for its analysis, the level being dictated by the facts said to constitute supply for consideration.[57]

In reply to the Commissioner's arguments in respect of the *DOT* case, the Tribunal found that this was not a case where there was a supply analogous to the supply of transporting an eligible disabled

[51] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [44].

[52] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [46].

[53] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [47].

[54] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [48].

[55] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [53].

[56] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [48].

[57] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [49].

person in return for the rebate. Their Honours also referred to the *Qantas* case, noting that this was also not a case where the consideration could be considered to be for more than one supply, as there was no easily identifiable supply between the Taxpayer and the manufacturers.[58]

Notably, the court also dealt with the Tribunal's consideration of the "essence or sole purpose" of the arrangement in reaching its conclusions. Following the Tribunal decision, in the *Qantas* case, the High Court rejected the argument that, in determining whether there was a supply for consideration between the airline and its passengers, it was necessary to extract the "essence" and "sole purpose" of the transaction.[59] In the present case, it was sufficient for the court that the Tribunal "did not merely focus on the essence or sole purpose of the arrangements" but "evaluated the whole of the relationship between the dealer and the manufacturer in order to determine whether there was any supply 'for consideration'".[60]

Having agreed that the Tribunal applied the correct test and taking into account the relevant considerations, the court expressed the same view as the Tribunal as to the nature of the relationship between the Taxpayer and the manufacturers, finding that the relationship:

> …involves a whole raft of obligations from one to the other all, presumably, with the ultimate objective of maximising their respective commercial positions. As the AP Group put it, the overall relationship contemplates a continuing dialogue between wholesaler and retailer in which promises are routinely exchanged, but **to characterise this dialogue as involving supply after supply is unrealistic and impractical**. To characterise the payment of the incentives intended to encourage the overall relationship to operate efficiently as involving supplies for consideration is equally unpersuasive. A dealer will always wish to sell as many cars as practicable and to move old stock to make way for new stock. So too a dealer will always wish its ordering arrangements to be the most efficient and economically beneficial to it. The manufacturer will have the same objectives. It is this context which underpins the Tribunal's conclusion that the payments are not for the supply of anything by the dealer (at [86]). (emphasis added.)[61]

For these reasons, the court found that there was no question of law that was raised on appeal that would vitiate the Tribunal's decision.[62] The court agreed with the Tribunal's decisions about each of the categories of incentive payments, and would have agreed with the outcomes even if the Taxpayer and the Commissioner had articulated the issues as questions of law.

MINORITY JUDGMENT

Bromberg J concurred with the conclusions of Edmonds and Jagot JJ in relation to AP Group's appeal, but dismissed the Commissioner's cross-appeal for different reasons.[63] His Honour had difficulty with the Tribunal's conclusion that a "supply" will not extend to a "foundational obligation" underpinning a commercial relationship.[64] Rather, Bromberg J explained that while "unreality" or impracticality may support a reading down of what constitutes a "supply", a line should not be drawn. His Honour stated "[t]hat a mutually beneficial outcome flowed from the same conduct to both AP Group and to a manufacturer, does not deny the possibility that insofar as a benefit flowed to a manufacturer, the payment offered by the manufacturer actuated the flow of that benefit."[65]

Bromberg J referred to the views expressed by the Commissioner in the public GST Ruling, GSTR 2001/6 *Goods and services tax: non-monetary consideration* (GSTR 2001/6). In particular, at [88]-[89] the Commissioner states:

[58] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [50].

[59] *Commissioner of Taxation v Qantas Airways Pty Ltd* (2012) 291 ALR 653 at [27].

[60] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [31]-[33]; *AP Group Ltd v Commissioner of Taxation* (2012) 83 ATR 493 at [82].

[61] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [53].

[62] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [54].

[63] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [56].

[64] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [66].

[65] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [77].

Example 8 - obligation to sell specified products

88. Franchisor supplies certain rights to Franchisee under a franchise agreement. Franchisee pays $10,000 for each year of the agreement, undertakes to sell only specified products for specified prices, and undertakes not to operate outside a particular geographical area.

89. The true character of the transaction is for the supply by Franchisor of certain rights in return for a monetary payment. The obligations Franchisee enters into are in the nature of defining and describing the supply by Franchisor. Although, when viewed in isolation they may meet the definition of both "supply" and "consideration", they do no more than define what Franchisor is supplying.

While his Honour considered the approach taken in GSTR 2001/6 to be attractive, he did not consider it to be the equivalent of the Tribunal's approach of reading down the definition of supply in respect of "foundational obligations." His Honour also found that the approach in GSTR 2001/6 was not argued by either the Commissioner or the Taxpayer (except in passing) and consequently, his view could only be regarded as tentative.[66]

Despite having difficulty with the reasons given by the Tribunal in respect of determining how the provisions should be read, his Honour did not disagree with the outcome that the "broad and unqualified" meaning of supply contended for by the Commissioner should be rejected.[67]

Additionally, his Honour considered that the Tribunal looked at the question of whether the supply was made for consideration from the wrong perspective. His Honour noted:

> The Tribunal seems to have concluded that the payments made to AP Group were not for the activities engaged in by AP Group because those activities would have been engaged in anyway as part of the running of AP Group's business. The proper question was whether the supply made by AP Group to the manufacturer was *for* a prospective payment later received.[68]

However, as the Commissioner did not challenge the decision on the basis that the Tribunal had looked at the question from the wrong perspective, his Honour agreed that the cross-appeal and notice of contention should be dismissed.

CONSEQUENCES

For parties that are involved in current or future tax litigation, the obvious lesson to be learned from the court's decision is the importance of framing the questions that are brought to the court as questions of law. Their Honours clearly indicate that both the Taxpayer and the Commissioner in this case could have brought valid questions of law before the court that might have enlivened the same issues they sought to clarify. The failure to do so made it impossible for the appeal or cross-appeal to succeed.

From a GST perspective, the case is interesting, not in the questions of interpretation that it resolves, but rather, in its illustration of why there are certain questions that may never be generically resolved, and may continue to be answered only on a case by case basis. The nature of the analysis that is required in order to apply ss 9-5, 9-10 and 9-15 is so fact dependent that it is almost impossible to extract any universal principles. This case, for example, sits somewhere in between the *TT-Line* case and the *DOT* case, both of those cases having given rise to completely different outcomes.

Unfortunately, for taxpayers, this provides little certainty as to how supplies should be identified and characterised. As the court noted, the resolution of these issues is difficult, particularly when different parties come at the same questions from different perspectives that are valid and coherent.

On a final note, taxpayers involved in similar rebates should consider the third party payment provisions in Div 134 of the GST Act that were introduced in 2010 and adjust GST liabilities and input tax credit entitlements in some circumstances.

[66] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [69].

[67] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [70]-[71].

[68] *AP Group Ltd v Commissioner of Taxation* [2013] FCAFC 105 at [75].