Case note

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UNIT TREND – THE HIGH COURT'S FIRST DECISION ON THE GST GENERAL ANTI-AVOIDANCE RULES

On 1 May 2013 the High Court handed down its decision in *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588, simultaneously granting the Commissioner's special leave application and allowing his appeal from the decision of the Full Federal Court. This is the first time the High Court has provided guidance as to the application of the general anti-avoidance provisions in Div 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act).[1] Specifically, the decision concerns the interpretation of s 165-5(1)(b) of the GST Act, which relevantly provides that the general anti-avoidance provisions do not apply where a "GST benefit" is "attributable to" the making of a choice, election, application or agreement that is expressly provided for by the GST Act.

In reaching its decision, the High Court upheld the declaration issued by the Commissioner to Unit Trend Services Pty Ltd (referred to as "Unit Trend" or the "taxpayer") negating a GST benefit in excess of $21 million.

THE FACTS

Unit Trend was the representative member of a GST group. Other members of the GST group included Simnat Pty Ltd (Simnat), Blesford Pty Ltd (Blesford), Mooreville Investments Pty Ltd (Mooreville) and Rapcivic Contractors Pty Ltd (Rapcivic). All of the entities were wholly owned subsidiaries of Raptis Group Ltd and are referred to in the decision as the "Raptis entities".

Simnat completed the purchase of a property in the Gold Coast on 20 April 1999 for $30 million. Development approval was subsequently obtained by Simnat to construct three towers, referred to in the decision as Towers I, II and III. Simnat entered into contracts with Rapcivic for the construction of the towers. Only the subsequent sale of Towers II and III are relevant for present purposes.

When the construction of Towers II and III was at an advanced stage, Simnat executed contracts of sale, transferring each of the towers to one of the Raptis entities. Importantly, the decision to transfer the partly completed towers to separate entities was a departure from the way developments were carried out by the Raptis entities in the past.[2] The taxpayer claimed that the "restructure" was undertaken for the purposes of "asset protection".[3]

For GST purposes, the intragroup sales were treated as GST-free supplies of going concerns under s 38-325 of the GST Act, as agreed between the parties. The supplies were not supplies of completed residential premises but, rather, were supplies of an incomplete construction project.[4] The details were as follows:

1. A contract was executed for the sale of Tower II by Simnat to Blesford on 14 April 2004. The sale was completed on 4 May 2004. The sale was treated as a GST-free supply of a going concern.
2. A contract was executed for the sale of Tower III by Simnat to Mooreville on 15 April 2004. The sale was completed on 23 November 2004. The sale was treated as a GST-free supply of a going concern.

In each case, the price for the sale was the price determined by an independent valuer. The price for Tower II was fixed at $149.8 million and the price for Tower III was fixed at $109.5 million. In respect of both properties, the purchase price was payable to Simnat by way of the purchaser taking

[1] All references to Divisions and sections are to Divisions and sections of the GST Act, unless otherwise stated.

[2] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [7].

[3] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [59].

[4] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [10].

responsibility for the external financing of the projects and by way of a loan owing to Simnat to be paid out from the proceeds of the sales of the completed units.[5]

Sales of the developed units took place following completion of Tower II in June 2004 and Tower III in December 2004. As many of the apartments had been sold off the plan, Simnat was the vendor named in 230 of the 289 contracts for apartments sold in Tower II and Blesford was the vendor named in the remaining 59 contracts. Simnat was the vendor named in 142 of the 241 contracts for apartments sold in Tower III and Mooreville was the vendor named in the remaining 99 contracts.[6] Amounts of GST in relation to the sales were reported by Unit Trend as the representative member of the GST group.

The margin scheme was applied to sales of the completed units to end buyers. The taxpayer determined the margin on sales that took place prior to 17 March 2005 by calculating the difference between the selling price to the end buyers and the consideration paid by Blesford and Mooreville to Simnat in relation to the intragroup, GST-free supply. This was permissible under Div 75 of the GST Act at that point in time. Subsequent amendments were made in 2005, inserting s 75-11 of the GST Act, which applies to supplies made on or after 17 March 2005.[7] Had the intragroup transactions not taken place, the margin would have been calculated as the difference between the selling price to the end buyers and the value of the property, as determined by way of an "approved valuation" as at 1 July 2000 or the acquisition price paid by Simnat.[8]

Following the introduction of s 75-11, in circumstances where an intragroup transaction has taken place prior to the sales to which the margin scheme is to be applied, the margin can no longer be calculated with reference to the consideration paid in respect of the intragroup transaction. Rather, the margin is required to be calculated with reference to a valuation as at 1 July 2000 or, if the property was first supplied to a member of the GST group after 1 July 2000, either the acquisition price paid by the group member or the market value if the vendor and purchaser were associates.[9]

Following a lengthy audit, the Commissioner rejected the GST treatment adopted by the taxpayer on two bases. First, he issued amended assessments across a number of tax periods, requiring an additional amount of more than $21 million to be paid by the taxpayer, on the basis that the margin scheme could not apply to the supplies to the end buyers. The Commissioner then issued a declaration to Unit Trend under s 165-40(a) of the GST Act, negating the GST benefit of more than $21 million. Penalties of $5.4 million (25%) were also assessed on alternate bases: failure to take reasonable care or a scheme shortfall.[10]

The taxpayer objected to the Commissioner's assessments and the declaration, and the objection decisions issued by the Commissioner were largely consistent with the early decisions. The taxpayer pursued the matter in the Administrative Appeals Tribunal (AAT).

THE ISSUE

The issue in contention before the High Court was whether the Commissioner was correct in his making of the declaration under Div 165 in respect of supplies that took place prior to 17 March 2005; specifically, whether the taxpayer's decision to interpose the intragroup sale of Towers II and III, thereby reducing its liability under the margin scheme by more than $21 million, falls within the ambit of the GST anti-avoidance provisions.

[5] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [8]-[9].

[6] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [12].

[7] As inserted by No 78 of 2005, s 3 and Sch 6, item 16.

[8] Under *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 75-10.

[9] *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 75-11(1).

[10] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [15].

THE GST GENERAL ANTI-AVOIDANCE PROVISIONS

The general anti-avoidance provisions are set out in Div 165 of the GST Act and have received relatively little scrutiny since the introduction of the GST. The *Unit Trend* case is the first case in which the provisions have been scrutinised by the High Court. At the relevant time, the provision setting out when Div 165 applies stated the following:

> **165-5 When does this Division operate?**
>
> *General rule*
>
> 1) This Division operates if:
>
> a) an entity (the ***avoider***) gets or got a GST benefit from a scheme; and
>
> b) the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the GST law, the wine tax law or the luxury car tax law; and
>
> c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:
>
> i. an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a GST benefit from the scheme; or
>
> ii. the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly; and
>
> d) the scheme:
>
> i. is a scheme that has been or is entered into on or after 2 December 1998; or
>
> ii. is a scheme that has been or is carried out or commenced on or after that day (other than a scheme that was entered into before that day).
>
> *Territorial application*
>
> 2) It does not matter whether the scheme, or any part of the scheme, was entered into or carried out inside or outside Australia. [underline emphasis added]

Importantly, in order for the Division to operate, the taxpayer must get a "GST benefit" from a "scheme", the "dominant purpose" or "principal effect" of the scheme must be to obtain the GST benefit and the GST benefit must not be "attributable to the making… of a choice, election, application or agreement that is expressly provided for by the GST law". It is noted that in respect of agreements made on or after 9 December 2008, the meaning of "attributable to" is modified by the following insertion into s 165-5:

> *Creating circumstances or states of affairs*
>
> 3) A GST benefit that the avoider gets or got from a scheme is not taken, for the purposes of paragraph (1)(b), to be attributable to a choice, election, application or agreement of a kind referred to in that paragraph if:
>
> a) the scheme, or part of the scheme, was entered into or carried out for the sole or dominant purpose of creating a circumstance or state of affairs; and
>
> b) the existence of the circumstance or state of affairs is necessary to enable the choice, election, application or agreement to be made.

While s 165-5(3) does not apply to any of the supplies made in relation to the *Unit Trend* case, the taxpayer considered that the amendments were relevant to how the earlier iteration of the section should be interpreted.

Section 165-10 of the GST Act contains the definitions of "GST benefit" and "scheme" and states the following:

> **165-10 When does an entity get a *GST benefit* from a scheme?**
>
> 1) An entity gets a ***GST benefit*** from a scheme if:
>
> a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme; or
>
> b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme; or

c) all or part of an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, payable later than it would have been apart from the scheme or a part of the scheme; or

d) all or part of an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, payable earlier than it would have been apart from the scheme or a part of the scheme.

*What is a **scheme**?*

2) A ***scheme*** is:

a) any arrangement, agreement, understanding, promise or undertaking:

i. whether it is express or implied; and

ii. whether or not it is, or is intended to be, enforceable by legal proceedings; or

b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

GST benefit can arise even if no economic alternative

3) An entity can get a GST benefit from a scheme even if the entity or entities that entered into or carried out the scheme, or a part of the scheme, could not have engaged economically in any activities:

a) of the kind to which this Act applies; and

b) that would produce an effect equivalent (except in terms of this Act) to the effect of the scheme or part of the scheme;

other than the activities involved in entering into or carrying out the scheme or part of the scheme.

The provisions, and in particular the meaning of "attributable to" in s 165-5 of the GST Act, were considered in detail by the AAT, and on appeal to the Full Federal Court and, finally, the High Court.

THE TRIBUNAL DECISION

Division 48 and Div 75 of the GST Act: How the margin should have been calculated

Supplies made before 17 March 2005

The AAT made a number of findings that were not subsequently appealed to the Full Federal Court or the High Court. One of these was the AAT's rejection of the Commissioner's argument that under Div 75, and irrespective of Div 165, the margin on the supplies should have been calculated with reference to the consideration paid for the acquisition of the interest by the "GST Group" and not with reference to the consideration paid in respect of the intragroup transactions. The Commissioner framed his argument in the following way:

> On a proper construction of the GST Act, in particular Divisions 48 and 75, s 75-10(2) of the Act (as it then stood) is to be construed as referring to, in this case, the consideration for the acquisition by [Simnat] of the land it acquired (apportioned in accordance with s 75-15 of the GST Act). The expression "you" applies to entities generally unless its application is expressly limited… The term "entity" covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does… The consequence is that the consideration paid for the acquisition of the interest by the GST group which [Blesford and Mooreville] form part, is the consideration on which the margin is to be calculated.[11]

The relevant part of s 75-10(2) (at that time) stated:

> The ***margin*** for the supply is the amount by which the consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question.

The Commissioner's argument was essentially that the reference to "your acquisition" is a reference to the acquisition made by the GST group, as Div 48 (the GST grouping provisions) and the Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Bill 1998* (Cth) convey an intention to treat GST groups as a single entity, and to disregard supplies made between members

[11] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [27].

of a GST group.[12] The reference to "your acquisition" is not, on the Commissioner's view, a reference to the acquisition of Blesford or Mooreville as the entities that are supplying the completed development to end consumers. Consequently, the taxpayer was incorrect in calculating the margin with reference to the consideration paid by Blesford or Mooreville.

The AAT rejected the Commissioner's argument on a number of grounds. The tribunal stated:

> We do not accept the Commissioner's argument. The GST system does not have a single entity style rule of the kind provided for in part 3-90 of the *Income Tax Assessment Act 1997* (Cth). Particular, and it might be observed, piecemeal, provision is made in the GST Act for dealing with, or ignoring, some, but not all, transactions that occur within a GST group. These provisions, and the effect they produce, can be described in the terms referred to in the Explanatory Memorandum. These references in the Explanatory Memorandum are not a warrant for advancing a single entity concept that would allow the term "your acquisition" to be construed as an acquisition by another entity. Further, the introduction of the amendments in 2005 would have been unnecessary if the section was to be construed as the Commissioner contends. There is no doubt that the requirements of Div 75 are otherwise satisfied. Each of [Blesford] and [Mooreville] acquired the land, they did so by a non-taxable supply, and they did so for a consideration determined by an arms' length valuation.[13]

Consequently, the AAT found that, subject to Div 165, the margin was calculated correctly under Div 75 in respect of the supplies made prior to 17 March 2005.[14]

Supplies made after 17 March 2005

The AAT found that, in respect of supplies made after 17 March 2005, the margin should have been calculated with reference to an approved valuation under s 75-11(2) of the GST Act, which applies to margins for the supply of real property acquired from a fellow member of a GST group (the vendor), where the vendor acquired the property prior to 1 July 2000. The valuation was required to comply with determinations issued by the Commissioner (ie MSV 2000/2), including that the property should have been valued as at 1 July 2000. The AAT found that the taxpayer had not obtained an approved valuation in respect of Towers II or III[15] (though it noted that "some of the Commissioner's criticisms are somewhat pedantic and do not really go to matters of substance").[16]

In reaching this decision, the AAT rejected an argument advanced by the taxpayer to the effect that there was no valid determination in writing by the Commissioner as to what constituted an approved valuation, despite the fact that an approved valuation, under s 75-35, was required to comply with such a determination. The AAT found that MSV 2000/2 was a determination for the purposes of s 75-35.

The Commissioner had agreed in the course of the proceedings that if the valuations were found not to be approved, the taxpayer should be allowed a further period of time in which to obtain an approved valuation.[17] This was, of course, subject to the AAT's views on the application of Div 165 to the arrangements.

The general anti-avoidance provisions

The AAT acknowledged that, on the facts, Div 165 could only apply in respect of supplies made prior to 17 March 2005. This is because the margin on supplies made on or after that date was not calculated with reference to the consideration paid in relation to the intragroup transactions (as discussed above). Consequently, the arrangements were not capable of giving rise to a "GST benefit" in respect of those later supplies.

In respect of supplies made prior to 17 March 2005, the AAT affirmed the Commissioner's declaration under Div 165. That is, the AAT agreed that, for the purposes of s 165-5, there was a

[12] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [27]-[31].

[13] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [32].

[14] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [33].

[15] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [51].

[16] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [49].

[17] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [54].

"scheme", the taxpayer obtained a "GST benefit" from that scheme and the GST benefit was "not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the GST law".

Scheme

The meaning of "scheme" is set out in s 165-10 of the GST Act (see above). The Commissioner identified the "scheme" as follows:

> Developco received advice from a professional advisor which formed the basis of a scheme. The scheme involved:
>
> a) a group of companies that engage in property development (at least including companies A and B);
> b) company A owns or buys land proposed for development, and undertakes the development to a point where the development has substantially progressed, and the overall value of the development is considerably higher than the price A paid for the land;
> c) company A sells the partially completed development to company B at market value. The timing of the sale is to occur at a time when the market value is significantly higher than the price A paid for the land;
> d) the sale by A to B is to be free of GST (either because it is a sale of a going concern, or because A and B are within a registered GST group under Division 48);
> e) company B completes the development, and sells to end buyers. Any sales made by A to end buyers would be honoured and completed by B;
> f) upon transfer to end buyers, company B would choose to apply the margin scheme in respect of its liability for GST (calculated based upon consideration B provided to A).
>
> Alternatively, the scheme involved the transferring by [Simnat] of Towers Two and Three to [Blesford] and [Mooreville] respectively in a manner which did not attract GST and the making of the transfers for a consideration which reduced the margin which would otherwise have applied had [Simnat] completed the sales or, in a broader sense, the transferring by [Simnat] of Towers Two and Three to [Blesford] and [Mooreville] respectively in a manner which did not attract GST; the making of the transfers for a consideration which reduced the margin which would otherwise have applied had [Simnat] completed the sales; and choosing to apply the margin scheme in respect of the subsequent supplies by [Blesford] and [Mooreville] to third party purchasers.[18]

The taxpayer did not dispute that these arrangements constituted a scheme for the purposes of s 165-10 of the GST Act and the Commissioner's identification of the scheme was accepted by the AAT.

GST benefit

In determining whether a GST benefit was obtained by the taxpayer under the scheme, the AAT gave consideration to what the likely scenario would have been in the event that the scheme had not been carried out, ie the "alternative postulate". The AAT took the view that, even in the absence of the scheme, the circumstances were such that the taxpayer would have applied the margin scheme to the sales to end consumers in any event. What would have been different, however, was the margin would have been calculated with reference to a valuation of the property as at 1 July 2000 rather than the consideration paid in respect of the intragroup supplies, thereby giving rise to a larger margin and a higher amount of GST payable.

Consequently, the AAT found that the GST benefit was the difference between the margin that would have been calculated with reference to Simnat's acquisition of the property had the intragroup transactions not taken place and the margin that was calculated with reference to the subsequent sales from Simnat to Blesford and Mooreville. However, no GST benefit arose in respect of supplies that took place on or after 17 March 2005 as the margin on those supplies could not, under the Act, have been calculated differently on the basis of the intragroup supplies.[19]

[18] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [85].

[19] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [102].

Dominant purpose or principal effect

Under s 165-10, the anti-avoidance provisions can only apply where one of the limbs in s 165-5(1)(c) applies – ie where either the entity (alone or with others) entered into or carried out the scheme, or part of the scheme, with the sole or dominant purpose of an entity obtaining a GST benefit, or where the principal effect of the scheme or part of the scheme is that the avoider gets the GST benefit from the scheme, directly or indirectly. Both limbs are to be considered with reference to s 165-15(1), which sets out the matters to be considered in determining purpose or effect. Those matters comprise the following:

(a) the manner in which the scheme was entered into or carried out;
(b) the form and substance of the scheme, including:
  (i) the legal rights and obligations involved in the scheme; and
  (ii) the economic and commercial substance of the scheme;
(c) the purpose or object of this Act, the *Customs Act 1901* (so far as it is relevant to this Act) and any relevant provision of this Act or that Act (whether the purpose or object is stated expressly or not);
(d) the timing of the scheme;
(e) the period over which the scheme was entered into and carried out;
(f) the effect that this Act would have in relation to the scheme apart from this Division;
(g) any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme;
(h) any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature;
(i) any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out;
(j) the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length;
(k) the circumstances surrounding the scheme;
(l) any other relevant circumstances.

Sole or dominant purpose limb

A number of observations were made by the AAT as to how the sole or dominant purpose test should be applied, with reference to the manner in which similar provisions have been applied by the courts in the context of Pt IVA of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936). In particular, the AAT stated that the enquiry must be focused on the purpose of the persons who entered into or carried out the scheme, not the purpose of the scheme itself.[20] Further, the tests are objective tests that go to whether, with regard to the factors listed in s 165-15, it is "reasonable to conclude" that the persons had the necessary sole or dominant purpose. The subjective purpose of those persons is not relevant.[21] Further, the relevant time that the tests apply to is the time of entering into or carrying out the scheme.[22]

There was acknowledgement by the AAT that, in executing the scheme, the entities entered into commercial transactions and that the arrangement was not a sham.[23] However, the AAT noted that the fact of the transaction being genuinely commercial does not preclude the operation of Div 165. In this respect, the AAT stated:

> … [E]ven if the ultimate objective of the transaction is genuinely commercial or the transaction producing the GST benefit also delivers a desired non tax commercial outcome, Division 165 may still

[20] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [115] with reference to *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 423; *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216 at [63] per Gummow and Hayne JJ.

[21] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [115] with reference to *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216 at [65] per Gummow and Hayne JJ.

[22] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [115] with reference to *Commissioner of Taxation v Mochkin* (2003) 127 FCR 185; 52 ATR 198 at [45]; *Vincent v Commissioner of Taxation* (2002) 124 FCR 350 at 372-373; *CPH Property Pty Ltd v Commissioner of Taxation* (1998) 88 FCR 21 at 42.

[23] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [114], [121].

> operate. Division 165 might apply if there is enough in the way in which a transaction is entered into or carried out, viewed through the prism of the matters listed in s 165-15(1) of the GST Act, that *the purpose of obtaining the GST tax benefit outweighs the commercial objectives*. The greater the degree of artificiality or contrivance in the transaction directed to obtaining the GST benefit the greater the prospect that the commercial pursuits of the transaction will not be dominant.[24] [emphasis added]

The AAT went on to weigh up the GST benefit against the commercial objectives of the entities. Specifically, and with reference to s 165-15(1)(a), which goes to the manner of execution of the scheme, it was acknowledged that the steps that were taken are "commonly taken by corporations to protect assets against exposure associated with business operations"[25] and that, aside from separating activities and assets into separate legal entities, "there are few, if any, ways in which assets and potential exposures could be isolated from other assets".[26] It perhaps worked in the taxpayer's favour that certain facts were considered irrelevant to an objective test of purpose, including the fact that the scheme "may have been brought to the [taxpayer] by a specialist GST adviser".[27]

There was, however, an additional question as to the extent to which the scheme actually achieved the desired outcomes in terms of "asset protection" and it was the outcome of this analysis that formed the basis of the AAT's determination in respect of sole or dominant purpose. Specifically, the AAT found that the objective of asset protection was not achieved in respect of those contracts that had been entered into by Simnat and end consumers. This is because, pursuant to those contracts, Simnat remained liable to claims by purchasers and the risk of litigation was not ameliorated by the scheme.[28]

Consequently, in respect of those contracts entered into by Simnat (372 of 530 contracts), where asset protection cannot be said to have been achieved by the scheme, the AAT found that the dominant purpose was to secure GST benefits generated by the scheme. In respect of the balance of the contracts, the AAT was satisfied that asset protection was the dominant purpose of entering into the scheme.[29]

Principal effect limb

The AAT's analysis here was similar to the analysis in respect of the sole or dominant purpose limb, though it was acknowledged that not all of the matters that are set out in s 165-15 are relevant to the question of "principal effect". The AAT considered that, in the circumstances, the effect should be considered, not from the perspective of the taxpayer as the representative member, but rather, on the participants in the scheme who undertook the transactions, ie Simnat, Blesford and Mooreville.[30]

The conclusion reached by the AAT was similar to that which was reached in respect of the sole or dominant purpose limb – namely, to the extent that the contracts of sale with end consumers were entered into by Simnat, no asset protection was achieved, and the principal effect of the scheme was the GST benefit. In respect of the balance of the contracts, the AAT was not satisfied that the principal effect of the scheme was to secure a GST benefit.

"Attributable to" or the "choice issue"

As noted above, s 165-5(1)(b) provides that in order for Div 165 to apply, the GST benefit obtained from the scheme must not be attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the GST law, as defined in the GST Act. The taxpayer argued that in the present circumstances, the GST benefit was attributable to a number of choices and agreements made under the GST Act. The taxpayer's arguments were summarised by the AAT as follows:

[24] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [114].

[25] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [117].

[26] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [118].

[27] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [119].

[28] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [128], [143], [148].

[29] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [148].

[30] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [151]-[152].

> The applicant contends that any GST benefit obtained by it was attributable to the making of a choice, election, application or agreement expressly provided for by the GST Act. It identifies those events as:
>
> a) the choices made by [Blesford] and [Mooreville] to become members of the GST group, a choice made under s 48-5 of the GST Act;
> b) the agreement by [Simnat] and [Blesford] that the supply of Tower Two was of a going concern, an agreement made under s 38-325(1)(c) of the GST Act;
> c) the agreement by [Simnat] and [Mooreville] that the supply of Tower Three was of a going concern, an agreement made under s 38-325(1)(c) of the GST Act;
> d) the choices made by [Blesford] and [Mooreville] to apply the margin scheme, choices made under s 75-5 of the GST Act.
>
> The applicant asserts that, had the election to sell the apartments as margin scheme sales not been made, the sales of apartments to third party purchasers would have been liable to GST and the amount would have been one eleventh of the sale price. Accordingly, the applicant asserts that the only reason a reduction in GST liability arises is the making of the election to effect margin scheme sales. It says that the relevant test in s 165-10 calls for an analysis of whether or not the GST benefit is attributable to the making of an election, election, application or agreement and that the decision of the High Court in *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (in liq)* [(2005) 225 CLR 488 at [79]-[80]] is authority for the proposition that "attributable" means a causative connection, not necessarily the sole causative connection or the primary causative connection. Additionally, the applicant contends that the decision of Greenwood J in *Walters v Federal Commissioner of Taxation* [(2007) 162 FCR 421] ought be regarded as having been decided *per incuriam* as his Honour's attention appears not to have been drawn to the observations of the High Court in *Sun Alliance*.[31]

The Commissioner disagreed with the taxpayer's approach, and relied on a different body of case law, pertaining to Pt IVA of the ITAA 1936, in support of the proposition that the GST benefit arose from the transfer of the properties and the subsequent sales that took place to end consumers, and not "as a result of simply making elections".[32] In particular, the Commissioner relied on the decision of Greenwood J in *Walters v Federal Commissioner of Taxation* (2007) 162 FCR 421 at [83]-[85], in which his Honour stated the following:

> The phrase in s 177C(2)(a)(i) "attributable to" the particular election, choice or event means that there must be a direct relationship between the non-inclusion of the relevant amount and the choice or election made by the taxpayer. [emphasis added]

In addition, the Commissioner argued that s 165-5(3) (extracted above) should also be taken into account, notwithstanding that it was only inserted into the GST Act in 2008 with effect in relation to choices, elections, applications and agreements made on or after 9 December 2008. The Commissioner argued it should be taken into consideration because the Explanatory Memorandum accompanying the amending legislation stated that the amendment was merely to confirm the existing law.

The AAT agreed with the Commissioner in finding that the GST benefit that arose from the scheme was not explained by choices made by the entities under the GST law, but rather, by the sales of the properties and the subsequent determination of the margin with reference to the consideration paid on the intragroup supplies. In this regard, the AAT stated:

> We take the view that the purpose of s 165-5(1)(b) is to preserve entitlements to benefits (measured in terms of reductions in GST that would otherwise apply) as a consequence of specified legislative provisions which create those benefits. We take the view that this exclusion does not extend to benefits that have some connection with choices that are provided for where the benefit is not explained by the choice but is explained by something else[33] – in this case the sales of Tower I and Tower II by [Simnat] to [Blesford] and [Mooreville]. The GST benefit here is attributable to the use of the higher amount as the consideration for the acquisition used in the calculation of the margin under the margin scheme rules.[34]

[31] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [105]-[106].

[32] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [107].

[33] Pagone GT, *Tax Avoidance in Australia* (The Federation Press, 2010) p 149.

[34] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [110].

The AAT did not consider it was necessary to have regard to s 165-5(3) in reaching this conclusion and, in any case, indicated that it may be problematic to have reference to the Explanatory Memorandum in circumstances where it was not before Parliament when the original legislation (applicable in the current circumstances) was passed.[35]

Summary of outcomes

The conclusions of the AAT on Div 165 can be summarised as follows:

1. Division 165 did not apply to supplies to end consumers that occurred on or after 17 March 2005.
2. Division 165 did not apply to supplies to end consumers that occurred before 17 March 2005 where Blesford or Mooreville, and not Simnat, were the vendors under the relevant sale contracts, as the dominant purpose and principal effect of the scheme in those circumstances was to secure asset protection.
3. Division 165 did apply to supplies to end consumers that occurred before 17 March 2005 where Simnat was the vendor under the relevant sale contracts, as asset protection was not achieved by the scheme in respect of those supplies and the dominant purpose and principal effect of the scheme was to obtain a GST benefit. The GST benefit arising from those supplies was *not* attributable to the making of a choice or election under s 165-5(1)(b).

Penalties

The AAT held that the 25% penalty was properly imposed but only to the extent that there was a scheme shortfall, ie in respect of sales that were contracted by Simnat.[36] The AAT found that those responsible for the shortfall had failed to exercise reasonable care.[37]

THE FULL FEDERAL COURT DECISION

Taxpayer's appeal

The AAT decision was appealed by both the taxpayer and the Commissioner. The taxpayer appealed on the basis that, in relation to the sales that settled after 17 March 2005, there was no applicable margin scheme valuation determination to allow it to calculate the margin by reference to s 75-11(2), contrary to the tribunal's findings that MSV 2000/2 was a determination that applied in that period. Consequently, as s 75-11(2) could not operate in the manner intended, either no GST was payable in respect of the transactions or the GST should have been calculated with reference to the market value of the properties at the time they were acquired by Mooreville and Blesford and the existing valuations were therefore valid.

Critical to the High Court proceedings that subsequently followed, the taxpayer also appealed on the basis that Div 165 did not apply in respect of the sales that settled before 17 March 2005, where Simnat was the original contracting party, as the GST benefit that arose from the scheme was attributable to a choice, election, application or agreement expressly provided for by the GST law for the purposes of s 165-5(1)(b) of the GST Act. The taxpayer did not, however, dispute the existence of a scheme as defined in s 165-5(2)[38] or that a GST benefit had been obtained as found by the AAT.[39]

Commissioner's cross-appeal

The Commissioner's cross-appeal related solely to the question of which margin scheme valuation determination applied in respect of the sales that settled on or after 17 March 2005. The Commissioner argued that, in addition to MSV 2000/2, MSV 2005/1 applied to supplies made between and including 17 March 2005 and 30 November 2005.

[35] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [108].

[36] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [172].

[37] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [166].

[38] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [114].

[39] *The Taxpayer and Commissioner of Taxation* (2010) 76 ATR 917 at [126].

Majority judgment

Margin scheme valuation determination

Their Honours, Bennett and Greenwood JJ, upheld the AAT's decision that MSV 2000/2 was a determination for the purposes of s 75-35 of the GST Act that applied in the relevant period. Their Honours also accepted the Commissioner's argument that MSV 2005/1 applied to supplies made between and including 17 March 2005 and 30 November 2005. Consequently, in relation to the sales to end consumers that settled after 17 March 2005, the taxpayer was required to obtain approved valuations (ie valuations that complied with those determinations) in order to calculate the margin in accordance with s 75-11(2) of the GST Act.

His Honour, Dowsett J, who otherwise dissented from the decision of the majority, agreed with the outcome in respect of MSV 2000/2 and MSV 2005/1.

Application of Div 165

The majority of the Full Court overturned the AAT's decision that Div 165 applied so as to deny the taxpayer the GST benefit obtained in respect of sales that settled on or after 17 March 2005 where Simnat was the original contracting party. Their Honours found that, as the GST benefit was attributable to a choice made by the taxpayer expressly provided for by the GST Act, s 165-5(1)(b) did not apply, and the taxpayer was entitled to retain the GST benefit.

In reaching their conclusions, Bennett and Greenwood JJ found that the AAT was mistaken in its finding that there was not a sufficient connection between the choices made by the taxpayer and the GST benefit to preclude the application of Div 165. In considering the object and aim of Div 165, their Honours considered that there was no indication that the choice was required to be the "sole or dominant cause of the GST benefit".[40] Their Honours found that the relevant choice could be one of a number of choices, some provided for in the GST law and others commercially driven. In this respect, their Honours stated at [177]:

> In those circumstances of *mixed choices* determined in part by the commercial arrangements and in part by choices expressly provided for by the GST law, the question to be decided is whether, as a matter of proper construction of s 165-5(1) in context, the GST benefit is *attributable to* the choices or elections implemented within the scheme expressly provided for by the GST law, or whether, because the scheme is comprised of those choices *and* other steps or choices not expressly provided for by that law, the GST benefit is *attributable* to the aggregated arrangement, that is, the scheme rather than the choices forming part of the scheme, expressly provided for by the GST law itself. [emphasis in original]

The test applied by the majority was a "but for test" that turned on whether the GST benefit would have arisen if the scheme, which included but was not limited to the statutory choice, had not been undertaken. In this respect, their Honours stated at [199]:

> Had not these choices been made to apply the margin scheme to end purchaser transactions, together with the choices made in the antecedent arrangements or transactions all forming part of the scheme from which the GST benefit arose, as found, the GST benefit calculated on the end purchaser transactions would not have arisen. The GST benefit is thus attributable to the choices, elections and agreements made by the taxpayer in the sense that the GST benefit is explained by those choices etc as expressly provided for by the GST Act.

And further at [201]:

> If what lies at the heart of the GST benefit obtained from the scheme is the intermediate transaction resulting in an uplift in the transactional cost base (coupled with the application of the margin scheme to end sales) the intermediate transaction within the scheme involved the taxpayer making a choice or election to enter into a going concern transaction in conformity with s 38-325(1)(c). *But for the making of the choice or election* to transfer Towers II and III as a going concern in conformity with s 38-325(1)(c), a GST liability would have arisen by reason of the settlement of each transfer. [emphasis added]

While the Full Court acknowledged that the GST benefit was contingent upon other choices, elections or agreements, including the steps that comprised the scheme, this did not prevent the GST

[40] *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at [170].

benefit from being attributable to those choices or elections under the GST Act. This, the Full Court found, "arises from the express use of 'attributable to' rather than a narrower or more restrictive test".[41]

Dissenting judgment

Dowsett J, in his dissenting judgment, took a different view of the test that should be applied in determining whether the GST benefit was attributable to a choice, election or agreement under the GST law. His Honour considered that in order for a scheme to be excluded from the application of Div 165, there must be a more direct link between the choices made under the GST law in the present circumstances and the GST benefit that arose.[42] Further, his Honour considered that the benefit should be attributable to *a* choice, rather than a series of choices, and in this respect stated the following at [47]:

> If I am correct in inferring that the inquiry posed by s 165-5(1)(b) is as to whether a GST benefit is attributable to a relevant scheme or to a relevant choice, it is most unlikely that Parliament intended that an outcome attributable to numerous choices would be excluded from the general operation of Div 165. After all, schemes will frequently involve multiple choices. Where one benefit is attributable to the interaction of numerous choices, it would be more accurate to attribute such benefit to that interaction, rather than to individual choices, taken discretely. The position may be otherwise where the scheme yields discrete benefits, each of which is attributable to a different, discrete choice.

For these reasons (with which the High Court subsequently agreed), his Honour found that the GST benefit that arose from the scheme was not attributable to a choice made under the GST law, and consequently the AAT was correct in its conclusions as to the application of Div 165.

THE HIGH COURT DECISION

Special leave to appeal to the High Court

The procedures involved in applying to the High Court for special leave to appeal were protracted in this case. The special leave application made by the Commissioner was initially heard by French CJ and Gageler J on 14 December 2012, who referred the matter to an expanded bench of the High Court for determination.[43] This essentially required the Commissioner to put his case before the expanded bench, without the benefit of knowing whether special leave would be granted. The unanimous decision to grant special leave formed part of the High Court decision.

The issue before the High Court

The appeal before the High Court by the Commissioner related only to a single question – namely, whether the GST benefits obtained by Unit Trend were attributable to the making of a choice, election, application or agreement (referred to collectively by the High Court as "a choice") for the purposes of s 165-5(1)(b).[44] This question related only to supplies made to end users pursuant to contracts that were settled before 17 March 2005 and in respect of which Simnat was the original contracting party – ie those supplies in respect of which the AAT found there was a scheme, a GST benefit had been obtained from the scheme and obtaining the GST benefit was both the dominant purpose of those who entered into and carried out the scheme and the principal effect of the scheme.[45]

There was no dispute before the High Court as to the existence of the scheme or the GST benefit. Nor did the Commissioner pursue the grounds that were the subject of the cross-appeal before the Full Federal Court. None of the material facts were in dispute. Consequently, against the fairly complex factual background and range of issues that were determined by the AAT, the matters that were scrutinised by the High Court were relatively straightforward.

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[41] *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at [202].

[42] *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at [48].

[43] *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2012] HCATrans 361.

[44] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [1].

[45] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588.

The Commissioner's arguments

The Commissioner argued that the decision of the Full Court did not give effect to the purpose or object of Div 165. In particular, the breadth of the definition of "scheme" is such that, in the absence of s 165-5(1)(b), Div 165 could apply in circumstances where a taxpayer makes a choice that is expressly provided for by the GST Act. However, this restriction on the application of Div 165 is only intended to apply "where the GST benefit is produced by an individual statutory choice, taken discretely" and "only in such a case".[46]

Following on from this argument, the Commissioner submitted that, contrary to the views expressed in the decision of the majority in the Full Court, the nature of the connection that must exist between a GST benefit and a statutory choice made under the GST Act must be "closer than that which is represented by an affirmative answer to a 'but for' test" and that "there must be a relationship of proximate or immediate cause and effect between the making of a choice expressly provided for by the GST Act and the getting of the GST benefit".[47] As noted by the High Court, this argument is consistent with the conclusion drawn by Dowsett J in his dissenting judgment that there must be a "direct link" between the statutory choice and the GST benefit.[48]

The taxpayer's arguments

The taxpayer put forward three arguments as to why the decision of the Full Court should be upheld. The first was that a scheme can be removed from the scope of Div 165 because of s 165-5(1)(b), even in circumstances where the choice is "but one element or step in a scheme which has generated the GST benefit".[49] In support of this argument, the taxpayer referred to the High Court authority of *Federal Commissioner of Taxation v Sun Alliance Investments (in liq)* (2005) 225 CLR 488; 60 ATR 560, which related to rebatable dividend adjustments under s 160ZK(5) of the ITAA 1936. Specifically, the High Court was asked to consider whether a distribution could "reasonably be taken to be attributable to profits that were derived by the company before the controlling shareholder acquired the share".[50] In that regard, the High Court stated:

> It is the concept of causation, rather than source, with which s 160ZK(5) is concerned. In determining whether the plaintiff's loss of employment was "attributable to" the provisions of the *Local Government Act 1972* (UK), Donaldson J in *Walsh v Rother District Council* [[1978] 1 All ER 510 at 514] said:
>
> > [T]hese are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient.
>
> Nothing, either in the text of s 160ZK(5) or in its objects as expressed in the Explanatory Memorandum on the Bill for the Amending Act, indicates that a narrower meaning should be presently ascribed to that phrase.[51]

The conclusion of the High Court, at least in the context of s 160ZK(5) of the ITAA 1936, was that a "relationship of proximate or immediate cause and effect", as argued by the Commissioner, was not necessary in interpreting the words "attributable to".

The taxpayer's second argument was that it was the choice to apply the margin scheme to the end sales that gave rise to the GST benefit. That is, regardless of the other steps involved in the scheme that led to the availability of the GST benefit, the GST benefit is only attributable to the choice made

[46] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [40]; *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at [46]-[47] per Dowsett J.

[47] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [41].

[48] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [41]; *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at [46].

[49] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [42].

[50] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [43].

[51] *Federal Commissioner of Taxation v Sun Alliance Investments Pty Ltd (in liq)* (2005) 225 CLR 488; 60 ATR 560 at [514]-[515].

by the taxpayer under Div 75 of the GST Act to calculate the margin in accordance with the margin scheme provisions. Consequently, even if the Commissioner is correct in his view that the test is one of whether the choice was the immediate or proximate cause of the GST benefit, the test is satisfied on the facts.[52]

Finally, the taxpayer argued that the insertion of s 165-5(3) into the GST Act in 2008 demonstrates that, in its absence, Div 165 would not encompass schemes of the kind that arises on the present facts.[53]

The conclusions of the High Court

In the unanimous judgment of French CJ and Crennan, Kiefel, Gageler and Keane JJ, the High Court agreed with the AAT's decision and the conclusions of Dowsett J in his dissenting judgment, and found that the GST benefit obtained by the taxpayer was not attributable to a choice made under the GST Act. The High Court's reasoning was based on its view of what precisely constituted the GST benefit in the circumstances and also took into account the purpose of the provisions and, in particular, what s 165-5(1)(b) was intended to achieve.

Contrary to the arguments of the taxpayer, the High Court took the view that the relevant GST benefit that arose from the scheme, identified by the AAT as the reduction in GST payable on the supplies to the end customers, was not a benefit that the taxpayer obtained by reason of the statutory choices made by the taxpayer. The GST benefit did not arise because of the choices made by the Raptis Entities to become members of a GST group, to effect the intragroup sales or to treat those sales as GST-free supplies of going concerns. Those choices merely resulted in no GST being payable in respect of the supplies.[54]

Further, the relevant GST benefit was not the GST benefit that arose as a consequence of the choice to apply the margin scheme. In reaching this conclusion (and the conclusions above), the High Court stated:

> Determination for the purpose of s 165-5(1)(b) of the GST Act of whether the GST benefit so identified "is not attributable" to the making by an entity "of a choice… that is expressly provided for" by the GST Act or another relevant law involves consideration of how the entity referred to in s 165-5(1)(a) got or is getting the GST benefit identified for the purpose of s 165-5(1)(a). It looks to the same factual and counterfactual analysis required by s 165-10(1)(a). The identified GST benefit is not attributable to the making of a choice by the entity or some other entity if: (a) the GST Act or another relevant law does not operate to confer the identified GST benefit by reference to that choice; or (b) the choice made in fact as part of the scheme would have been made in any event without the scheme.[55]

The High Court agreed with the AAT's conclusion that, even in the absence of the scheme, the choice to apply the margin scheme is a choice that would have been made (by Simnat, rather than Mooreville or Blesford) even in the absence of the scheme.[56] Further, the taxpayer's assertion that the GST benefit was attributable only to the application under the margin scheme (the second argument) was, the High Court concluded, a matter of confusing the timing of the realisation of the GST benefit rather than what the GST benefit "got" from the scheme was attributable to.[57]

Their Honours found that the relevant GST benefit was in fact obtained as a consequence of a commercial choice, being the choice to transfer the towers so that the margin on the end supplies would be calculated with reference to a higher amount of consideration.[58] In this respect, their Honours stated at [58]:

[52] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [45].

[53] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [46].

[54] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [48], [61].

[55] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [60].

[56] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [62].

[57] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [64].

[58] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [48], [58].

> The GST benefit got from the scheme reflected the amount agreed to be paid to Simnat as the consideration for the transfer of Towers II and III, which in turn reflected the increase in the value of the properties by reason of the work done upon them. That GST benefit was not something to which Unit Trend was entitled as a matter of the exercise of any statutory choice. It was what the majority in the Full Court characterised as "a commercial election or choice" involved in the transfer of the properties to Blesford and Mooreville in accordance with the scheme *after* the substantial increase in the value of the properties. This brought about the uplift in the intermediate cost base from which the GST was got[59].

Consequently, the GST benefit was not "attributable to" the making of any statutory choice for the purposes of s 165-5(1)(b).

The analysis of the High Court took into account the purpose of Div 165 and, in particular, s 165-5(1)(b), with reference to the legislative intention reflected in the Supplementary Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Bill 1998* (Supplementary EM).[60] The Bill was revised so as to include s 165-5(1)(b) and, by way of explanation, paragraph 1.118 of the Supplementary EM stated:

> Queries have been made about the scope of the current Division 165. It has been suggested that the Division may have unintended effects and may apply to transactions not intended to defeat GST law. In particular, it has been suggested that the exercise of an explicit option under the GST law may trigger the anti-avoidance provisions.[61]

The limited circumstances in which a scheme would fall outside the operation of Div 165 as a result of s 165-5(1)(b) are further reflected in changes made to s 165-1 of the Bill (at the same time as s 165-5(1)(b) was inserted) so that the following explanation is now provided:

> This Division is aimed at artificial or contrived schemes. It is not, for example, intended to apply to:
> - an exporter electing to have monthly tax periods in order to bring forward the entitlement to input tax credits; or
> - a supplier of child care applying to register under the *Childcare Rebate Act 1993* (registration would make the supplies of child care GST-free); or
> - a supplier choosing under section 9-25 of the *A New Tax System (Wine Equalisation Tax) Act 1999* to use the average wholesale price method for working out the taxable value of retail sales of grape wine; or
> - a bank having its car fleet serviced earlier than usual, and before 1 July 2000, so that the servicing does not, at least initially, bear the GST.

With reference to s 165-1, the High Court concluded at [56]:

> The upshot of this analysis is that s 165-5(1)(a) and (b) require a GST benefit got from a scheme to be subject to scrutiny by reference to the other criteria in s 165-5 if the getting of the benefit referred to in s 165-5(1)(a) is not *an entitlement the source of which is the making of a choice expressly authorised by another provision of the* GST Act. [emphasis added]

Against this backdrop of the purpose and intended operation of s 165-5(1)(b), the High Court accepted the Commissioner's argument and the conclusion of the AAT that this was not a case where the connection between the choice and the GST benefit was sufficient to preclude the application of Div 165.

The High Court also emphasised that the real test in s 165-5(1)(b) is not whether a GST benefit *is* attributable to a statutory choice but, rather, whether the GST benefit was *not attributable to* a statutory choice. Their Honours took the view that the Federal Court mistakenly focused on the word "attributable" rather than the phrase "not attributable to".[62] For this reason, the High Court distinguished the comments made in *Sun Alliance* as being made "in a markedly different context".[63]

[59] *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at [200]-[201].

[60] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [53].

[61] Cited in *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [53].

[62] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [33].

[63] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [51].

Their Honours articulated the difference between the two approaches at [51]:

> While the word "attributable" was considered in *Sun Alliance* to be concerned with a contributory cause rather than source, the phrase "not attributable to" in s 165-5(1)(b) is used in a context in which a causal link is assumed to have been established in terms of the getting of a benefit from a scheme in which a statutory choice is an element. *The expression "not attributable to" in s 165-5(1)(b) is not concerned to identify another relationship of cause and effect which might or might not proceed on a different level of cause and effect from that expressed by "got… from". Rather, the expression is, in its context, concerned with the absence of a statutory entitlement to the GST benefit in question*. [emphasis added]

Consequently, the taxpayer was unable to rely on the authority in *Sun Alliance* that the requisite connection in order to satisfy the "attributable to" test need not be direct or proximate. For this reason and the reasons outlined above, the taxpayer's first and second arguments were rejected.

Finally, the High Court did not consider that the insertion of s 165-5(3) assisted the taxpayer. Their Honours did not see the insertion as "an acknowledgement by the Parliament that, without it, Div 165 would not have encompassed a situation such as that of present concern".[64] Based on the AAT's unchallenged findings as to the scheme, and the High Court's findings that the GST benefit was not attributable to a statutory choice, their Honours found that Div 165 applied without s 165-5(3) of the GST Act. Consequently, the taxpayer's third and final argument was rejected.

The High Court has provided some clarification on what was previously an area of uncertainty in the GST law. While there has been a fairly comprehensive body of case law in relation to the meaning of the words "attributable to", this case law has largely arisen in what the High Court would describe as "markedly different contexts". Importantly, decisions such as *Repatriation Commission v Law* (1980) 47 FLR 57, while taking a liberal interpretation of what it means for something to be "attributable to" a choice or an event, have related to circumstances where an individual is attempting to obtain a benefit. In that case, a widow's entitlement to a war widow's pension depended on whether her husband's death was "attributable to" his war service. The Full Federal Court made the following comments:

> It seemed clear that the expression "attributable to" involved an element of causation and the cause need not be the sole or dominant cause: it is sufficient to show "attributability" if the cause is one of a number of causes providing it is a contributing cause.[65]

This authority has been applied in a number of subsequent cases, but never in the context of tax avoidance.[66] Pagone J, writing extrajudicially in his text, *Tax Avoidance in Australia*, somewhat prophetically stated:

> … [I]t would be unsafe to assume that a court would regard the degree of connection that was considered sufficient in *Law* as sufficient in the context of Div 165. *Law's* case required a court to consider whether an individual qualified for a pension and, therefore, might attract an interpretation favourable to a claimant.[67]

This is where the Full Federal Court and the High Court diverged in their approach to the interpretation of s 165-5(1)(b). While the Full Court referred to *Law* and similar cases in reaching its conclusions,[68] the High Court's interpretation was tailored to the purpose of Div 165 and the mischief it seeks to address. Arguably, in light of that purpose, and the apparent artificiality of the scheme entered into by the taxpayer, the ultimate outcome was the appropriate one.

[64] *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 87 ALJR 588 at [67].

[65] *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at [190].

[66] Pagone, n 33, p 148.

[67] Pagone, n 33, p 148.

[68] *Unit Trend Services Pty Ltd v Commissioner of Taxation* (2012) 205 FCR 29 at [190].