Case note

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QANTAS: A LANDMARK CASE OR DEJA VU?

On 2 October 2012, the High Court handed down its much anticipated decision in *Commissioner of Taxation v Qantas Airways Ltd* (2012) 86 ALJR 1243 (*Qantas* case). For those tax lawyers and accountants who settled comfortably in their office chairs, decision in hand, in anticipation of a comprehensive treatise on the meaning of supply in the Australian context, the judgment may have seemed somewhat anticlimactic. The conclusions of the High Court in its majority judgment were distilled into less than a dozen lines. One might surmise that the reason for this was that, as far as the High Court was concerned, and contrary to the outcome in the Full Federal Court, the case merely sought to test the boundaries of the High Court's earlier decision in *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 (*Reliance Carpet* case). If that is indeed the case, it has not prevented many tax professionals from espousing the view that the case will have a dramatic impact on the GST landscape, because of the High Court's interpretation of the meaning of "supply".

Broadly, the *Qantas* case relates to the GST treatment of prepaid fares for domestic flights forfeited by passengers in the event that they cancelled or otherwise missed their reserved flights. The question was whether those payments constituted consideration for a supply that was made by Qantas, which would result in such a supply being taxable and give rise to an amount of GST payable by Qantas. The supply, if it existed, would be something other than the flight itself, as the flight was never supplied. In considering the issue, the High Court (as well as the Full Federal Court and, before it, the Administrative Appeals Tribunal) engaged in a forensic analysis of what, if anything, Qantas provided to its passengers in the absence of the flight with reference to the terms and conditions of the contract entered into by the parties at the time of the reservation.

The majority of the High Court (Gummow, Hayne, Kiefel and Bell JJ, with Heydon J dissenting) found that while Qantas and Jetstar "did not provide an unconditional promise to carry the passenger and baggage on a particular flight", what they did supply was "at least a promise to use best endeavours to carry the passenger and baggage", for which the consideration was received.[1] Consequently, Qantas is liable to remit GST on those supplies. The decision is similar to the outcome in the *Reliance Carpet* case, where the High Court unanimously found that a vendor makes a supply to a purchaser when a contract for the sale of land is entered into, for which a forfeited deposit is consideration for a "bundle of rights" received by the purchaser. Similarly, in those circumstances, a vendor must pay GST in respect of such a supply.

Incidentally (if not strictly relevant to the technical analysis), when Qantas accepted payments from its customers at the time that the reservations were made, it also charged the customers an amount of GST. Under the contractual terms agreed to by the customers and Qantas, customers were not entitled to a refund of the GST component when its customers forfeited the fares. Hence, had Qantas succeeded before the High Court, it would have effectively received a considerable windfall gain.

STATUTORY DEFINITION OF SUPPLY "AS WIDE AS LANGUAGE CAN MAKE IT"

The most basic principle of the GST regime in Australia is that in order for GST to be payable in respect of a supply, the supply must be "taxable". A taxable supply is defined in s 9-5 of the GST Act to include one made for consideration, in the course or furtherance of an enterprise, connected with Australia and by a registered person. Most relevantly for present purposes, is the requirement that "you make the supply for consideration" ("you" in this context meaning the supplier who is liable to remit the GST).

The definition of supply is set out in s 9-10. Relevantly, subs (1) states that "[a] *supply* is any

[1] *Commissioner of Taxation v Qantas Airways Ltd* (2012) 86 ALJR 1243 at [33].

form of supply whatsoever", while subs (2) states:

> 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).
>
> [bolding is emphasis added]

The statutory concept of consideration in s 9-15 is equally broad. Consideration is relevantly defined to include "any payment, or act or forbearance, in connection with a supply of anything".[2] It also includes, "any payment, or any act or forbearance, in response to or for the inducement of a supply of anything".[3] It does not matter who makes the payment (ie it can be a party other than the recipient of the supply) and it does not matter whether the consideration is paid voluntarily.[4]

The definitions of "supply" and "consideration" in the GST Act are, to borrow the Commissioner's expression,[5] as wide as language can make them. In their application, however, it is clear that these concepts are narrowed by the context in which they appear together. In order for a supply to be taxable, a supply must be made *for* consideration. Consideration, for the purposes of the GST Act, includes a payment received *in connection with* a supply. In other words, for a taxable supply to arise there must be a sufficient nexus between a supply and consideration.

In the *Qantas* case, within the very broad parameters set by the legislative definitions, the High Court found that there was a supply made by Qantas, in so far as Qantas provided its customers with a promise to use its best endeavours to facilitate their flights. On the other side of the transaction, the customers paid consideration in the form of a sum of money to Qantas to reserve flights that, ultimately, were never taken. Consequently, there was a sufficient nexus between the payment made by the customer and the supply made by Qantas to constitute, from Qantas' perspective, a supply made for consideration, and consideration received in connection with a supply.

THE FACTS

As noted above, the case related to payments received by Qantas and Jetstar from their customers to reserve flights that, ultimately, were not taken, because the customers either cancelled their reservations or did not show up for their reserved flights. Pursuant to the terms and conditions of carriage and the fare rules, Qantas was entitled to retain the fares and was not required to pay the customers refunds. In some cases, the customers would have been entitled to full refunds *if* they requested one within a specified time period, but if no request was made, no entitlement to a refund arose and Qantas had no legal obligation to pay the refund.

The Qantas Conditions of Carriage were reproduced in some detail in both the reasons for decision handed down by the Administrative Appeals Tribunal[6] and in the judgment handed down by the Full Court of the Federal Court,[7] as well as in the High Court decision. Most significantly, cl 9.2

[2] *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 9-15(1(a). All references to sections are to sections of the GST Act, unless otherwise stated.

[3] *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 9-15(1)(b).

[4] *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 9-15(2).

[5] Commissioner's Submissions in *Commissioner of Taxation v Qantas Airways Ltd* (No S47 of 2012, 9 March 2012) at [25].

[6] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170.

[7] *Qantas Airways Ltd v Commissioner of Taxation* (2011) 195 FCR 260.

provided:

> [Qantas] will take all reasonable measures necessary to carry you and your baggage and to avoid delay in doing so.

If prevented from carrying the passenger on the designated flight, then Qantas promised a number of options, namely, to "carry you at the earliest opportunity on another of our scheduled services" or to "re-route you to the destination" or to "make a refund".[8] The following Qantas and Jetstar terms, reproduced by the Full Court, illuminate the nature of the agreement:

> [Qantas]
>
> 5. Fares
>
> 5.1 What Your Fare Covers
>
> Your fare covers the flight(s) for you and your Baggage Allowance:
> - from the airport at the place of departure specified on your ticket
> - to the airport at the place of destination specified on your ticket
>
> …
>
> 5.5 Buying Your Ticket
>
> To buy your ticket you or someone on your behalf must pay:
> - the applicable fare
> - any other applicable fees or charges, and
> - all taxes imposed by governments (see 5.7)
>
> …
>
> 6.3 Ticket is a Valuable Document
>
> You should treat your ticket as a valuable document and take all necessary precautions to prevent it being damaged, lost or stolen. If your ticket is lost or stolen, you should notify us and, if away from home, the police as soon as possible.
>
> …
>
> 6.6 Ticket Validity
>
> …
>
> **Travel wholly within Australia or wholly within New Zealand** – unless the ticket provides otherwise, a ticket for Domestic carriage within Australia or within New Zealand is valid for one year from the date of issue of the ticket.
>
> [Jetstar]
>
> 2. WHEN THESE CONDITIONS OF CARRIAGE APPLY
>
> …
>
> 2.3 Basis of carriage
>
> The carriage of a Passenger on any flight by Jetstar is, without exception, subject to:
> - a Booking
> - these Conditions of Carriage and the Key Conditions of Carriage set out in your Itinerary and Tax Invoice
> - applicable laws which may include the Civil Aviation (Carrier's Liability) Act 1959 (Australia) and any international Conventions that may apply to the journey in question
> - any applicable Tariffs filed by us with regulatory bodies;
> - any specific directions given to a Passenger in writing, or orally by Jetstar staff and
> - the fare rules and conditions or Frequent Flyer Award redemption rules, as applicable.
>
> In the event of any inconsistency between the Conditions of Carriage and the Key Conditions, the Conditions of Carriage will prevail.
>
> …
>
> 4. BOOKINGS
>
> 4.1 When is a Booking made?

[8] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170 at [3], citing the Qantas Conditions of Carriage.

> A Booking for a flight is made when recorded as accepted and confirmed by Jetstar or an Authorised Agent. If you ask, we or our Authorised Agent will give you written confirmation of your Booking. We do not accept any responsibility for any loss you may incur as a result of making arrangements for travel on Jetstar through anyone other than Jetstar or its Authorised Agent
>
> 4.2 Payment essential
>
> Even if you have a Booking for a flight, if Jetstar has not received your payment you will not be carried.
>
> 5. FARES
>
> 5.1 What your fare covers
>
> Your fare covers the flight(s) for you and your applicable Baggage Allowance:
> - from the airport at the place of departure specified in your Booking
> - to the airport at the place of destination specified in your Booking.

Jetstar gave no guarantee that the flight would depart on schedule, but if it did not, Jetstar undertook to try and assist the customer in reaching their destination and promised a refund if an alternative to a cancelled flight could not be arranged.

Both parties accepted that the terms and conditions and fare rules reflected a very conditional contract, as Qantas reserves to itself the right to make changes, including to cancel a particular flight. In the words of counsel for the Commissioner, "the contract is very vague and diffuse… but it was enough to enable Qantas to retain the fare".[9]

THE DISPUTE IN DETAIL

Qantas described the supply to which the payments by its customers related as the flights and nothing else, because this was the "contemplated supply" when the agreement was entered into. Qantas argued that the flight was "the essence and sole purpose of the transaction" and, therefore, the only supply for which the consideration was paid. In circumstances where the flights were not taken, the supplies to which the payments related were never made. Consequently, Qantas argued that it made no taxable supply that gave rise to an amount of GST payable.

Additionally, Qantas argued that supplies of rights and supplies of entry into obligations (within the terms of s 9-10(2)(e) and (g)) can only constitute taxable supplies where those rights and obligations are "the entirety of what is bargained for".[10] In other words, the supply of a right to receive a thing, or the supply of an obligation to provide a thing, cannot be a taxable supply unless that thing is actually received or provided. This was a bold argument that sought to confine what is a very expansive definition of "supply" in s 9-10 of the GST Act, which includes no such qualification.

The Commissioner's view was that one need not look to the essence or sole purpose of the transaction in order to identify a supply made for consideration. Any supply made for consideration will do. Indeed, the Commissioner took the view that there are several supplies made by Qantas in its dealings with customers when a booking is made, regardless of whether the flight was ultimately taken, including "a supply of rights under a contractual promise of carriage".[11] On this view, it is incorrect to approach the analysis from the perspective of what supply was contemplated or intended. One must look at what was actually supplied. Though the main purpose of the customer in entering into the contract may have been the flight, this is irrelevant in circumstances where, as a matter of fact, something else was provided by Qantas in return for the payment of consideration.

It is inherent in the Commissioner's argument that an amount of consideration paid at a point in time may relate to more than one supply, and that one or more of those supplies may never eventuate. As the attribution rules in the GST Act often require the GST to be paid prior to the supply being made, it may be unclear at the outset how the supply will manifest. This does not preclude those amounts of consideration from being paid "in connection with" the supplies that do, in fact, eventuate. In the present circumstances, had the flight been taken, the consideration would have been paid in

[9] *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 132 (4 June 2012) at 19.

[10] *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 132 (5 June 2012) at 67.

[11] *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 132 (4 June 2012) at 8.

connection with that flight as well as the other supply of rights relating to the reservation. However, this does not prevent the same amount of GST from being payable solely in connection with the supply of rights in the event that the flight is never taken.

"Intended supply" approach

In its written submissions to the High Court, Qantas stated:

> The sole issue throughout these proceedings, has been whether the Respondent ever made the supply for which the consideration was prepaid, given that the flight which the customer paid for was not taken… On current facts, there is no other candidate for such a taxable supply, or certainly none that can be said to relate to the fare as a whole.[12] [footnotes omitted]

On the other hand, the Commissioner argued before the High Court:

> The issue is not, as the Full Court of the Federal Court erroneously assumed it to be, whether the supply of carriage by air concurrently and conditionally promised by Qantas was the "relevant supply" or the "essence and sole purpose" of the transaction. Those questions do not address, or arise under, the language of the statute.[13]

The difficulty with Qantas' approach is that the GST is not a tax on *intended* supplies, it is a tax on *actual* supplies, notwithstanding that the attribution rules may result in the GST becoming payable prior to the actual supplies being made.[14] There is nothing in the legislation that provides that a supply made for consideration can be disregarded if it was not intended to be the dominant supply under the arrangement at the time the consideration was paid or the tax invoice issued. That consideration could have been provided "in connection with" any number of supplies made by that supplier.

This is not to say that the "essence and sole purpose" of a transaction is irrelevant. These words can be linked to the words of the statute to the extent that they inform the analysis of whether a supply was made *for* consideration. That is, if the essence and sole purpose of the transaction was the flight, it begs the question of whether the consideration can be said to have been paid for anything else. However, the intended supply will not, in all cases, be the essence and sole purpose of the transaction. It is arguable that, even if carriage is the primary purpose of reserving a flight, another real and significant purpose is having that flight secured (to the extent this is possible, given the nature of air travel) and made available.

One appealing aspect of Qantas' approach is that it would have allowed suppliers greater certainty in respect of the GST consequences of the supplies they make. If the primary object of a supply falls away, so does the supply in its entirety for the purposes of GST. There is no need to consider the residual elements of the supply or how the characterisation of the supply might be affected (eg if the failed supply would have been GST-free, but the residual supply is input taxed or subject to GST).

However, a significant concern that arises from this approach is that amounts may be collected from customers on the basis that they are payments of GST, but would never be remitted to the Commissioner as such. Customers who are not entitled to input tax credits will have paid an amount of GST notwithstanding that they did not receive a taxable supply, and they may not have a contractual entitlement to recover those amounts (as was the case on the present facts). GST-registered customers may claim input tax credits and fail to adjust for them once the reservation is cancelled or the flight is not taken (especially where they are not contractually entitled to a refund of the GST), leaving the Commissioner out of pocket.

"Any supply for consideration" approach

The Commissioner submitted to the High Court:

[12] Qantas' Submissions in *Commissioner of Taxation v Qantas Airways Ltd* (No S47 of 2012, 30 March 2012) at [1].

[13] Commissioner's Submissions, n 5 at [4].

[14] GST is payable in respect of a taxable supply on the earlier of the receipt of any consideration or the issue of an invoice; see *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 29-5.

> The statutory question posed by ss 9-75 and 9-15 is whether there was a supply of *anything* for which the unused fares were consideration (ie, in connection with which they were paid).[15]

The Full Federal Court considered the Commissioner's approach to be misconceived, stating:

> Statutory mandate aside, the task of identifying, in a given case, the "taxable supply" among consecutive acts of supply cannot be a function of, or dependent upon, the failure of an outcome which, if it had not failed, would have been the "taxable supply". In other words, simply because an outcome, which is the supply paid for, fails, does not provide some warrant, statutory mandate aside, to search for and identify some other anterior supply as the "taxable supply".[16]

The Commissioner's answer to this was that if the flight had been taken, it would not have been "the" taxable supply, as such. It would have been the dominant part of a broader taxable supply that included the rights, services etc. In circumstances where the flight was not supplied, one need not search for some other anterior supply, but rather look for what *was* supplied. That is, the analysis turns to what Qantas actually did to earn the money that it justified retaining from the customer.

In some circumstances, where the dominant part of a supply falls away, there may indeed be nothing left that bears a nexus to the consideration that was paid. The approach must be a practical one, as contended by both Qantas and the Commissioner. It should reflect the commercial reality of the transaction. The payment of money in and of itself is not justification for artificially creating a supply where one has not been made. But there is a question as to whether this was the appropriate case to draw that line in the sand. Here, the customer did not take the flight but, arguably, it derived value from the reservation and the right to be carried.[17] It paid Qantas a sum of money. The customer agreed to pay Qantas that sum of money upon entering into the arrangements, including in the event of not taking the flight, which was a scenario contemplated in the terms and conditions of the agreement.

In contrast to Qantas' approach, the Commissioner's approach, as adopted by the High Court, could create some uncertainty for taxpayers in that, when the GST must be paid (ie the earlier of the receipt of any consideration or the issue of an invoice), the nature of the supply that is to take place will not always be apparent. Difficulties may arise where the supply that actually takes place has a different GST consequence to the supply that was contemplated (eg taxable rather than GST-free). Arguably, however, this approach reflects the very broad definitions of "supply" and "consideration" in the statute, which are intended to establish a very wide GST base.

Summary of Administrative Appeals Tribunal reasons

At first instance, the tribunal found in favour of the Commissioner in concluding that Qantas made a supply, being the creation of rights and of the entry into an obligation, within the terms of s 9-10(2)(e) and (g) of the GST Act. The tribunal concluded that the amounts forfeited by the customer were consideration for that supply. They summarised their decision as follows:

> We can see no reason why, in the present case, the arrangements made with passengers do not fall within both s 9-10(2)(e) and (g). We do not understand Qantas to have argued that there was no contract. Such an argument, would, of course, impact on the asserted right of Qantas to claim cancellation fees and, in some cases, the forfeiture of the whole fare. Nor do we understand Qantas to have argued that there was no "right" or "obligation" within s 9-10.[18]

The tribunal also found that there had been a supply of services under the contract between Qantas and the customers, for which the non-refunded fares were consideration. It stated that:

> plainly, the acts of recording the reservation and processing it towards preparedness for check in and seat allocation involve the provision of services.[19]

This was notwithstanding that "they would never be provided except as part of the passenger's

[15] Commissioner's Submissions, n 5 at [41].

[16] *Qantas Airways Ltd v Commissioner of Taxation* (2011) 195 FCR 260 at [42].

[17] *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 132 (5 June 2012) at 115.

[18] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170 at [14].

[19] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170 at [23].

desire, at the time of reservation, to travel".[20] The tribunal went on to say:

> A way of describing what Qantas has done for such a passenger, and in return for the "fare" that the passenger has paid, is holding itself ready… to take all reasonable measures necessary "to carry you and your baggage and to avoid delay in doing so".[21]

The tribunal also stated that there was "no reason why that holding ready is not itself the provision of a sufficient service to give rise to the imposition of GST".[22]

However, that conclusion as to the supply being constituted by the provision of a service was only its alternative conclusion, as the tribunal held that "the preferable basis upon which to dispose of this case seems to us to be that there is… the supply of a service under s 9-10(2)(e) and (g)"[23] (ie a creation of rights and the entry into of obligations). Therefore, the tribunal held that the assessments issued to Qantas were not shown to be excessive and GST was payable.

Summary of Full Court of Federal Court reasons

The Full Court of the Federal Court unanimously overturned the tribunal decision, taking the view that the supplies identified by the tribunal were not supplies for which the consideration was paid by the customer. The Full Court held that the "relevant supply in the present case is the contemplated flight, not the reservation… and the contemplated flight failed to occur"[24] and that the tribunal had erred in "artificially splitting the transaction".[25] Consequently, the Full Court decided that there had been no taxable supply where the flight was not taken. The Full Court stated the following:

> … it is plain that what each customer pays for is carriage by air. This is **the essence, and sole purpose, of the transaction**. The prospective supply is of air travel, dare we say, in the face of *Reliance Carpet* (at [13]), "nothing more or less". Having recognised the actual travel had not been supplied, and that was the purpose of the booking, that should have been the end of the inquiry. The actual travel was **the relevant supply**, and if it did not occur there was no taxable supply. Instead, what the Tribunal did was to look for other "acts" satisfying the definition of supply. It erred in doing so, for even if the identified "acts" were capable of meeting the definition of supply, they were not "acts" for which the consideration was provided.[26] [footnotes omitted, bolding is emphasis added]

In reaching this conclusion, the court considered the decision in the *Reliance Carpet* case, which addressed a similar issue as to whether the forfeiture of a deposit on the acquisition of real property constituted consideration for a supply in circumstances where the acquisition did not eventuate (discussed below). The court also considered a number of cases on the characterisation of supplies, including *Travelex Ltd v Commissioner* (2010) 241 CLR 510, *Saga Holidays Ltd v Commissioner of Taxation* (2005) 149 FCR 41 and *AGR Joint Venture and Federal Commissioner of Taxation* (2007) 70 ATR 466.

High Court majority decision

The reasons of the High Court were expressed as follows, at [33]-[34]:

> The Qantas conditions and the Jetstar conditions did not provide an unconditional promise to carry the passenger and baggage on a particular flight. They supplied something less than that. This was at least a promise to use best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operations of the airline. This was a "taxable supply" for which consideration, being the fare, was received.
>
> The GST payable for that taxable supply was attributable to and included in the calculation of the Qantas net amount for the tax periods in issue in this litigation and the assessments objected to were not shown to be excessive. [footnotes omitted]

[20] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170 at [23]

[21] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170 at [24].

[22] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170 at [24].

[23] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170 at [26].

[24] *Qantas Airways Ltd v Commissioner of Taxation* (2011) 195 FCR 260 at [49].

[25] *Qantas Airways Ltd v Commissioner of Taxation* (2011) 195 FCR 260 at [57].

[26] *Qantas Airways Ltd v Commissioner of Taxation* (2011) 195 FCR 260 at [56].

The conclusion is unequivocal and concise. There was a supply made by Qantas and it received consideration for that supply. All the requirements for a taxable supply were met and, consequently, GST was payable on that taxable supply. Once the nexus has been proved, there is no additional test to be applied.

Much has been made of the fact that the High Court has treated a mere "promise to use best endeavours" as a supply, but due weight should also be given to the words that follow, "having regard to the circumstances of the business operations of the airline".[27] While some argue that treating a hedged about contractual promise as a supply is impractical, the words "circumstances of the business operations of the airline" answer that by showing it is practical in the context of Qantas' business, as Qantas, like any airline, never unequivocally promises to carry a passenger on a flight. Qantas frequently cancels flights, overbooks flights and for many reasons (presumably including maintenance issues, weather problems, air traffic etc) a customer may find themself unable to fly as they had intended. The fact that Qantas' contractual terms qualify the promise because it is commercially and practically necessary for it to do so does not mean, as a matter of fact, that the promise it does make is not substantial enough to constitute a supply.

Relevance of cases on characterisation

The High Court was asked to consider the relevance of a number of cases on characterisation when considering the question of whether Qantas has made a supply for consideration. In the characterisation cases, and unlike the present case, it was not disputed that a supply or supplies had been made for consideration, but the relevant issue was whether that supply or those supplies were taxable, input taxed or GST-free. In the *Travelex* case, the issue before the High Court was whether a supply of Fijian bank notes was a supply of tangible goods or a GST-free supply of rights. In the *Saga Holidays* case, the issue before the Full Federal Court was whether a supply of a holiday package was a single supply of real property or multiple supplies of services and GST-free rights. The *AGR Joint Venture* case, decided by the tribunal, addressed whether the supply of coin blanks was two separate supplies of a credit to the customer's metal account (which would be GST-free or input taxed) and a taxable supply of services, or a single taxable supply of coin blanks. None of these cases dealt with the threshold issue of the identification of a supply for consideration.

If the task of characterising a supply that has been made for consideration was analogous to identifying a supply that has been made for consideration, then the question of what was the "essence and sole purpose of the transaction" between Qantas and its customers would have been relevant to the High Court's decision, as this concept is frequently invoked in the cases on characterisation. This was the approach put forward by Qantas and accepted by the Full Federal Court. In this respect, the Full Federal Court noted:

> In *Travelex Ltd v Commissioner* (2010) 241 CLR 510 at [32] French CJ and Hayne J (who with Heydon J comprised the majority) clearly supported recourse to **the purpose of the transaction** as identifying the relevant supply.[28] [bolding is emphasis added]

The opposing view advanced by the Commissioner was that the task of characterising a supply requires a different approach than that which ought to be applied when determining whether a supply has been made for consideration. This is because the central issue in the characterisation cases is the extent to which supplies for consideration are taxable, GST-free or input taxed. The Commissioner stated in his submissions to the High Court:

> Issues of characterisation (expressed as questions of "essential character" or of identifying a "relevant supply") arise where the issue is whether the supply in connection with which an amount is received as consideration is a taxable supply, an input taxed supply or a GST-free supply. They do not arise in this

[27] *Commissioner of Taxation v Qantas Airways Ltd* (2012) 86 ALJR 1243 at [33].

[28] *Qantas Airways Ltd v Commissioner of Taxation* (2011) 195 FCR 260 at [47].

> case, where all the potential supplies were taxable supplies, and the only issue for resolution is whether there was any supply at all in connection with the receipts taken into the calculation of the assessed net amounts.[29]

In (implicitly) agreeing with the Commissioner, the majority of the High Court summarised their view of those cases as follows:

> *Travelex Ltd v Federal Commissioner of Taxation* turned upon subdiv 38-E (headed "Exports and other supplies for consumption outside Australia") and in particular upon the phrase "in relation to rights" in Item 4 of the table appearing in s 38-190, which listed certain supplies which were GST-free; this Court held that the supply of foreign currency notes was sufficiently a supply "in relation to rights" to attract the exemption. *Saga Holidays Ltd v Commissioner of Taxation*, a decision of the Full Court of the Federal Court, turned upon the phrase "connected with Australia" in par (c) of s 9-5, and upon s 9-25(4), which stipulated that "[a] supply of real property is *connected with Australia* if the real property, or the land to which the real property relates, is in Australia"; the decision of Gzell J in *TAB Ltd v Commissioner of Taxation* hinged upon the phrase in Div 126 "relating to the outcome of a gambling event" in the definition of the term "gambling supply" (s 126-35(1)(b)).[30] [footnotes omitted]

This conclusion reflects that nothing in the GST Act requires the "characterisation" exercise to be undertaken when determining whether a supply has been made for consideration. The statutory definitions are quite clear and, arguably, do not invite a "reasonable approach" or any other value judgment to be exercised in identifying a supply. The "essence and sole purpose" of a transaction may be relevant to determining whether there is a sufficient nexus between a supply and consideration but, importantly, that is not the context in which that phrase, in its various iterations, has been applied in the cases on characterisation. Those cases answered a different question. Consequently, the Commissioner made a strong argument and the High Court seemed to be in agreement, that the characterisation cases are largely irrelevant in this context.

It is also important to note that, in all of the cases on characterisation, the supply was made in the manner that was contemplated at the outset. The process of characterising the supply was undertaken with reference to what *was* supplied, rather than what *was intended* to be supplied. There is a real question as to whether the analysis would have been undertaken in the same way if, for example, in the *AGR Joint Venture* case the services were still carried out but the coin blanks were not ultimately provided. In circumstances where all the contemplated supplies were provided, the services were ancillary to the coin blanks, which were the "real purpose" for the supply, and the consideration was apportioned accordingly. However, that is not to say that the services could not have stood alone as a supply under s 9-5 of the GST Act in circumstances where the coin blanks were not delivered.

The Reliance Carpet case

As noted above, the High Court decision in the *Reliance Carpet* case addressed whether the forfeiture of a deposit on the acquisition of real property constituted consideration for a supply where the acquisition did not proceed. The High Court found that the deposit was consideration for a supply of entry into an obligation to do certain things (s 9-10(2)(g)) and was taxable.[31] The obligations included maintaining the property, paying rates, taxes, and other outgoings in respect of the land.[32] Further, there was a supply of a grant of real property within the terms of s 9-10(2)(d).[33]

Qantas' view of the High Court decision in the *Reliance Carpet* case threw back into contention matters that the Commissioner thought, or hoped, had been settled. Following the handing down of the *Reliance Carpet* decision in May 2008, the Commissioner stated in his "Decision Impact Statement":

> In determining that there was a supply made by the taxpayer to the purchaser, the High Court examined the events that actually occurred and asked whether they gave rise to something meeting the statutory

[29] Commissioner's Submissions in Reply in *Commissioner of Taxation v Qantas Airways Ltd* (No S47 of 2012, 10 April 2012) at [3].

[30] *Commissioner of Taxation v Qantas Airways Ltd* (2012) 86 ALJR 1243 at [22].

[31] *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [37].

[32] *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [37].

[33] *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [38].

> definition of supply in section 9-10. As a result, they found that there was such a supply. This can be contrasted with the Full Federal Court's approach which seemed to characterise events that, although contemplated, did not occur and on that basis determined that actual events meeting the statutory description of supply were not to be treated as such.[34]

Qantas' view of the decision was much more limited. In its written submissions to the High Court it stated:

> … [Reliance Carpet] concerned the GST treatment of a deposit, and whether the forfeited deposit was consideration for any supply at all, not being the whole supply. The present case concerns the GST treatment of the *pre-payment of the whole consideration* and whether that consideration is for the whole supply. No issue of forfeiture arises. It is impossible to align the case factually with *Reliance Carpet*.
>
> Further, in *Reliance Carpet* this Court emphasised the importance of interests in land as being what the contract concerned and of the related effect of an interest in land (in rem) coming into existence. In the context of that case, it meant that there was (if only for a time) delivery of part of the very thing that the contract was designed to deliver – ie, an enforceable interest in land. There is no analogue in the present case: no right of property or in equity arises.[35]

These very different interpretations relied on different parts of the High Court judgment. The Commissioner referred to the more general conclusions as stated, for example:

> 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". One of the characteristics of the deposit was that upon its payment on 5 February 2002 it operated as a security for the performance of the obligation of the purchaser to complete the Contract and was liable to forfeiture on that failure. That is sufficient for the Commissioner's case.[36]

Viewed in isolation, this appears to be the end of the matter. However, in another part of the judgment there was a more detailed consideration of the expansive definition of real property in s 195-1 of the GST Act to include "a personal right to call for or be granted any interest in or right over land". For example, the High Court stated:

> Further, as indicated earlier in these reasons, and within the meaning of para (d) of s 9-10(2) as extended by the definition of "real property", there was upon exchange of contracts the grant by the taxpayer to the purchaser of contractual rights exercisable over or in relation to land, in particular of the right to require in due course conveyance of the land to it upon completion of the sale.[37]

However, in the preceding paragraph of the judgment, the High Court endorsed the tribunal's finding[38] that there was also a supply of an entry into an obligation within the terms of s 9-10(2)(g). Also, as noted, s 9-10(2) is merely a list of examples of supplies and does not limit the expansive definition of supply in s 9-10(1) so, arguably, nothing turns on the fact that s 9-10(2)(d) refers to an expansive definition of real property.

The majority of the High Court (implicitly) endorsed the views of the Commissioner and, arguably, highlighted its disapproval of Qantas' interpretation of the decision, and the manner in which the Federal Court applied the decision, by simply reproducing in some detail what was said in the earlier decision, the implication being, perhaps, that the words speak for themselves. Specifically, their Honours referred to [28] (reproduced above). No detailed analysis was provided.

The parties also took opposing views as to whether the *Reliance Carpet* case was limited to circumstances where Div 99 of the GST Act applies. Relevantly, s 99-5 of the GST Act states:

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[34] Australian Taxation Office, *Decision Impact Statement re Commissioner of Taxation v Reliance Carpet Co Pty Ltd [2008] HCA 22* (4 June 2008).

[35] Qantas' Submissions, n 12 at [46]-[47].

[36] *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [28].

[37] *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [38].

[38] *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [34].

> 99-5 Giving a deposit as security does not constitute consideration
>
> (1) A deposit held as security for the performance of an obligation is not treated as *consideration for a supply, unless the deposit:
>
> (a) is forfeited because of a failure to perform the obligation; or
>
> (b) is applied as all or part of the consideration for a supply.
>
> (2) This section has effect despite section 9-15 (which is about consideration).

On the Commissioner's view, s 99-5 simply deferred any GST consequences from arising upon the payment of the deposit until it is determined whether or not the contract would proceed to completion. In the written submissions to the High Court, the Commissioner stated:

> In *Reliance Carpet*, this Court construed Division 99 as an attribution mechanism, a "'wait and see' provision," by which a security deposit, **which otherwise would on payment be consideration for a supply under the executory contract**, is taken to be such consideration only when and if it is either forfeited or applied on completion, and not, for example, if it is refunded on rescission of the contract. At the time of the forfeiture the suspending operation of s 99-5 ceased, and in that (timing) sense the supply "became" a taxable supply.[39] [footnotes omitted, bolding is emphasis added]

Effectively, the Commissioner argued that, in the absence of Div 99, which is essentially a timing mechanism, the same GST consequences would have arisen immediately upon payment of the deposit.

Qantas, on the other hand, argued that there is nothing in Div 99 to suggest that, in its absence, the deposit would be treated as consideration for a supply. In its submissions to the High Court, it stated:

> Given the question in *Reliance Carpet* was the GST treatment of a deposit and its forfeiture, that case was about Division 99. In finding that the forfeited deposit was consideration for a supply, this Court found that Division 99 operated as a "wait and see" provision, whereby the task of identifying what the deposit was paid "for" was deferred until such time as the contract was completed or the purchaser defaulted.[40] [footnotes omitted]

The Full Court found that, rather than merely deferring the attribution of what would otherwise be a taxable supply (as argued by the Commissioner), Div 99 was a statutory mandate for treating the deposit, which was otherwise an anterior supply, as *the* taxable supply for which the consideration was paid. Their Honours stated the following:

> Statutory mandate aside, the task of identifying, in a given case, the "taxable supply" among consecutive acts of supply cannot be a function of, or dependent upon, the failure of an outcome which, if it had not failed, would have been the "taxable supply"… *Reliance Carpet* **was a case where the statute mandated that approach**.[41] [bolding is emphasis added]

In overturning that finding, the majority of the High Court found the following:

> Division 99, to which reference has been made above, was described by this Court[42] as a "wait and see" provision, whereby a deposit was taken to be consideration only when it was forfeited. The case provides no support for the proposition adopted by the Full Court in the present case that it was necessary to extract from the transaction between the airline and the prospective passenger the "essence" and "sole purpose" of the transaction.[43]

A review of outcomes of the *Reliance Carpet* case provides a helpful reminder that the Qantas decision is not a dramatic departure from the state of the law after that decision was handed down.

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[39] Commissioner's Submissions, n 5 at [51].

[40] Qantas' Submissions, n 12 at [48].

[41] *Qantas Airways Ltd v Commissioner of Taxation* (2011) 195 FCR 260 at [42].

[42] *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [35].

[43] *Commissioner of Taxation v Qantas Airways Ltd* (2012) 86 ALJR 1243 at [27].

"Practical business" approach

One of the more interesting aspects of the *Qantas* case is that no answer to the issues presented itself simply by considering the "substance and reality"[44] of the transaction. Both Qantas and the Commissioner presented fairly cogent arguments as to why their approach was the practical, commonsense approach.

From Qantas' perspective, it is in the business of supplying flights and that is the purpose for which it enters into arrangements with its customers. As it was put to the High Court:

> … in the real world, when the customer puts the phone down from the travel agent and is asked, "What was that about?" they say "I have just booked my flight to Melbourne". They do not say, "I have just made an agreement that Qantas will hold itself ready for a period, in case I turn up".[45]

This may be true, and indeed the tribunal found that a flight was "obviously the purpose of each reservation".[46] Even counsel for the Commissioner conceded that the flight is "the intended objective of both parties at the outset".[47]

However, there is another practical and business viewpoint to be considered. Why does the customer risk forfeiture of the fare in the event that they are unable to travel by making a reservation prior to their date of departure? Why not just arrive at the airport just in time to reserve and board their desired flight? The obvious answer is that the customer derives some value from the reservation itself – that is, from Qantas promising to undertake its best efforts to provide them with the opportunity to fly. Whatever amount Qantas retains despite the flight not having been taken is an amount that the customer was prepared to forfeit in the event they didn't fly, presumably in return for the comfort of a reservation having been made.

It follows that, to the extent (however limited) that the intention of the passenger is relevant to answering the question of what the consideration paid was "for", as reflected in the terms of the contract, the argument that the customer derived no benefit from the reservation is problematic. As put by counsel for the Commissioner:

> The substance of the reality is that the reason [Qantas] is entitled to retain [the fares] is that it gave value for them. The value was the reservation, and the right to be carried. That is, in our submission, a taxable supply, and in our submission it is sufficient to sustain the assessments…[48]

The plurality in the High Court did not address whether Qantas or the Commissioner put the best argument forward in terms of which was the more practical approach, presumably as there was no ambiguity in the law that required them to take these extraneous considerations into account.[49] However, the conflicting approaches taken by the parties serve to reinforce the difficulty with attempting to take a "practical business" or "commonsense" approach to the analysis of rights in the GST context.

Consequences of the Qantas case

Tax specialists are divided as to the likely consequences of the High Court's decision. Some have argued that it fundamentally shifts the GST landscape in Australia, that GST clauses need to be rewritten in order to take account of unintended supplies and that the outcome undermines the effectiveness of the GST as a "practical business tax"; similar submissions were made by Qantas to the High Court.

[44] *Saga Holidays Ltd v Commissioner of Taxation* (2005) 149 FCR 41 at [42]-[43].

[45] *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 132 (5 June 2012) at 70.

[46] *Qantas Airways Ltd and Commissioner of Taxation* (2010) 81 ATR 170 at [10].

[47] *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 132 (5 June 2012) at 110.

[48] *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCATrans 132 (5 June 2012) at 115.

[49] Note, however, that Heydon J in his dissenting judgment preferred, at [46], "[a]n interpretation of s 9-5… [which] conforms more closely to practical reality". In his view, "the fare was paid not to get a conditional promise to supply an air flight (which promise did take place) but to get an actual air journey (which never took place)".

The authors do not consider that there is anything on the face of the decision to suggest that it constitutes such a fundamental change to the way that the GST law is interpreted and applied. First, it largely reaffirms the High Court's earlier decision in the *Reliance Carpet* case. Secondly, it gives rise to an amount of GST payable in circumstances where there has clearly been an act that falls within the definition of supply and where there has been a payment that the passenger was willing to make, and agreed in advance to make, in the event that the flight was not taken.

Presumably, Qantas' customers make reservations in advance, and don't simply arrive at the airport on the day of the flight, because they want the comfort of knowing that they have Qantas' "promise to use best endeavours" to allow them to board their desired flight. That promise has a substantive value to those customers – so much so that, in all the relevant cases, passengers were willing to forfeit any right to a refund of the payment in circumstances where the flight wasn't taken. This outcome was contemplated at the outset in the terms and conditions of the agreement. The payment was not a gift by the customer, nor was it a form of payment that falls outside of the definition of "consideration". It was an amount the customer was willing to pay, in the absence of taking the flight, for (and therefore "in connection with") the promise that was received.

This is not to say that there could not be a case where a finding of a taxable supply is so removed from the outcome intended by parties to an arrangement that it inordinately and unfeasibly broadens the scope of the GST. It is merely to say that this was not that case. The outcome was a rational one and consistent with the way that Qantas itself chose to apply the GST law for some eight years.

The Commissioner issued his Decision Impact Statement in relation to the High Court's decision on 9 November 2012 setting out his views as to the consequences of the judgment. The Statement indicates that the Commissioner does not expect any significant change to the way he will apply the GST law. He states the following:

> The decision does not cause any significant change in the way the Commissioner approaches "supply", or the nexus between supply and consideration. Obviously, it is necessary in any case where a payment is made to consider the particular facts and circumstances to determine whether there is anything supplied, and if so whether the payment has a sufficient nexus to be consideration for what is supplied.

These comments suggest that the judgment is unlikely to result in the Commissioner artificially dissecting transactions and identifying numerous "unintended" or "unanticipated" supplies – a possible scenario in respect of which some taxpayers and advisers, as well as Qantas itself before the High Court, have expressed concern.

EYES ON AP GROUP LTD V COMMISSIONER OF TAXATION

Some final comments ought to be made in relation to another case that is making its way through the courts – *AP Group Ltd v Commissioner of Taxation* [2012] AATA 409 – currently on appeal in the Federal Court. The case is relevant because it poses similar questions about the breadth of the definition of supply, in the context of arrangements between car manufacturers and car dealerships, where the manufacturers provide the dealerships with rebates in particular circumstances. The question is whether those rebates are consideration for a supply made by the dealership.

The case is particularly notable in the present context for two reasons. First, many of the same arguments that were put forward by Qantas in the tribunal were also run by AP Group Ltd and, secondly, the tribunal took a different approach in respect of some of the arrangements – namely, that the acts performed by the dealership in order to qualify for the rebates were not sufficient to constitute a supply.

The case will be observed with interest as it proceeds to the Federal Court and may validate or disprove the concerns that have been raised in response to the *Qantas* case. Time will tell whether or not the factual matrix in that case warrants a different outcome to that in the *Qantas* case.