


Decision impact statement

Commissioner of Taxation v Complete Success Solutions Pty Ltd ATF Complete Success Solutions Trust

Court/AAT citation/s:	[2023] FCAFC 19 [2021] AATA 3399
Venue:	Full Federal Court of Australia Administrative Appeals Tribunal
Venue reference no:	NSD 1089 of 2021 2019/1708 and 2020/2991
Judge/AAT member name/s:	Moshinsky, Thawley and Hespe JJ Senior Member R Olding
Judgment date:	23 February 2023 17 September 2021
Appeals on foot:	No
Decision outcome:	Mostly favourable to the Commissioner

Impacted advice

 The ATO is reviewing the impact of this decision on related advice and guidance products.

- Law Administration Practice Statement PS LA 2005/24 *Application of General Anti-Avoidance Rules*

Summary

This Decision impact statement outlines the ATO's response to this case. The substantive issue clarified in the Full Federal Court's decision concerns the application of the dominant purpose test and the principal effect test under the general anti-avoidance provisions in Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

All legislative references in this Decision impact statement are to the GST Act.

Brief summary of facts

At issue was the entitlement of Complete Success Solutions Pty Ltd as trustee for Complete Success Solutions Trust (CSS) to input tax credits (ITCs) under the GST Act in 2 periods:

1. From 1 August 2016 to 30 November 2016 (First Period), CSS claimed to have made GST-free supplies of precious metal (gold bullion) and to be entitled to ITCs in respect of the scrap gold (gold

that was not in investment form) which it had acquired and caused to be refined into gold bullion.

2. From 1 December 2016 to 31 January 2017 (Second Period), CSS claimed to have made GST-free export sales of scrap gold and to be entitled to ITCs in respect of its acquisition of that scrap gold.

In the First Period, CSS was a party to a series of back-to-back transactions, a representative of which can be summarised as follows.¹ An entity known as Manila Exchange acquired gold bullion under a GST-free supply. It purportedly defaced or adulterated the gold bullion such that it became scrap gold. It then sold the scrap gold to an entity known as GB Refiners as a taxable supply. Although the scrap gold had a lower value than the gold bullion, the supply of scrap gold attracted GST. Manila Exchange was able to profit from its value-lowering operations only because of its fraud, constituted by charging and not remitting GST. GB Refiners then on-sold the scrap gold as a taxable supply to PM Melt Service Pty Ltd (PMMS). The scrap gold was then sold by PMMS to CSS as a taxable supply. At the end of the transactions, CSS caused the gold to be delivered to and refined by either ABC Refinery (Australia) Pty Ltd (ABCRA) or La Gajjar Pty Ltd (La Gajjar) and claimed that GST-free supplies of gold bullion were made to these entities. La Gajjar conducted CSS's transactions on behalf of CSS.²

In the Second Period, CSS was a party to a series of back-to-back transactions, a representative of which can be summarised as follows.³ Manila Exchange acquired gold bullion under a GST-free supply and purportedly adulterated the gold bullion thereby producing scrap gold. Manila Exchange sold the scrap gold to GB Traders Pty Ltd (GB Traders) as a taxable supply in respect of which GST was payable. The price charged to GB Traders was a GST-inclusive price. GB Traders claimed an ITC for the GST it paid. Manila Exchange did not remit the GST it collected on these taxable supplies. GB Traders sold the scrap gold to PMMS as a taxable supply. PMMS sold the scrap gold to CSS as a taxable supply. The series of transactions ended with CSS causing the export of the scrap gold to Emirates Gold in Dubai, claiming that GST-free export supplies of scrap gold were made. PMMS negotiated and arranged the export sales of scrap gold on behalf of and in the name of CSS.⁴

In respect of the First Period:

1. The Commissioner issued notices of assessment of net amounts to CSS on the basis that⁵:
 - (i) CSS made taxable supplies to La Gajjar on which CSS understated the GST payable on its supplies and was entitled to ITCs on its acquisitions, and
 - (ii) CSS was not entitled to ITCs on its acquisitions used to make its supplies to ABCRA on the basis that those supplies were input taxed supplies, or alternatively, CSS was not carrying on an enterprise, or in the further alternative, Division 165 applied to negate the benefit of the ITCs.

¹ *Commissioner of Taxation v Complete Success Solutions Pty Ltd ATF Complete Success Solutions Trust* [2023] FCAFC 19 (Full Federal Court decision) at [7].

² Full Federal Court decision at [5].

³ Full Federal Court decision at [13].

⁴ Full Federal Court decision at [14].

⁵ Full Federal Court decision at [20].

2. The Commissioner assessed CSS to an administrative penalty of 75%.⁶

In respect of the Second Period⁷:

1. The Commissioner issued notices of assessment of net amounts to CSS on the basis that CSS was not entitled to ITCs in respect of its acquisition of scrap gold for 2 alternative reasons
 - (i) CSS was not carrying on an enterprise
 - (ii) Division 165 applied to negate the benefit of the ITCs.
2. The Commissioner assessed CSS to an administrative penalty of 50%.⁸
3. CSS objected to the assessments of net amounts and administrative penalties. The Commissioner disallowed the objections. CSS applied to the Administrative Appeals Tribunal (AAT) for review of the objection decisions.

The AAT decided the issues before it as follows:

1. In relation to the issues⁹ concerning the First Period¹⁰, the supplies made by CSS were taxable supplies and not GST-free supplies because the requirements of section 38-385 were not satisfied. CSS was entitled to ITCs on its acquisitions of scrap gold. Division 165 was not applicable as CSS did not obtain a GST benefit. The penalty was reduced from 75% to 50% based on recklessness.
2. In relation to the issues concerning the Second Period¹¹, the supplies made by CSS were GST-free supplies under subsection 35-185(1). Division 165 did not apply as it could not be concluded that any entity had a dominant purpose of securing CSS's entitlement to ITCs. Further, the principal effect of the scheme was the non-payment of GST by Manila Exchange and not CSS obtaining ITCs. No penalty arose as there was no shortfall.

The Commissioner appealed the AAT's decision in respect of the Second Period in relation to the findings on the dominant purpose test and the principal effect test under subsection 165-5(1).

CSS cross-appealed the AAT's decision in respect of the First Period.

Issues decided by the Court

The Full Federal Court considered the following issues:

1. Whether Division 165 applies with respect to the supplies made in the Second Period (Second Period Division 165 issues), and
2. In respect of CSS's cross-appeal, whether CSS made GST-free supplies in the First Period and accordingly whether any penalty should have been imposed (First Period issues).

⁶ Full Federal Court decision at [21].

⁷ Full Federal Court decision at [22].

⁸ Full Federal Court decision at [23].

⁹ Before the AAT, the Commissioner abandoned the contention that CSS was not carrying on an enterprise: Full Federal Court decision at [42].

¹⁰ Full Federal Court decision at [43].

¹¹ Full Federal Court decision at [56].

Second Period Division 165 issues

The Full Federal Court made the following observations about the Second Period Division 165 issues:

1. The task required by paragraph 165-5(1)(c) requires the drawing of conclusions of fact by reference to each of the matters set out in section 165-15 and an ultimate conclusion about dominant purpose and principal effect, also being a conclusion of fact.¹²
2. Where CSS got a GST benefit from a scheme, Division 165 applies if, taking account of the matters described in section 165-15, it is reasonable to conclude that either¹³
 - (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 (subparagraph 165-5(1)(c)(i)), or
 - (ii) 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 (subparagraph 165-5(1)(c)(ii)).
3. In determining the dominant purpose test under subparagraph 165-5(1)(c)(i)¹⁴
 - (i) it is the purpose of each entity identified under the scheme that must be analysed. Different entities may, and often will, have different dominant purposes
 - (ii) further, subsection 165-15(1) applies in relation to the consideration of each entity's purpose in entering into a part of the scheme as if that part were the scheme itself (subsection 165-15(2)).
4. In determining the principal effect test under subparagraph 165-5(1)(c)(ii)¹⁵
 - (i) It is not only the principal effect of the scheme as a whole which will engage the operation of Division 165. If the principal effect of a part of the scheme is that the avoider gets the GST benefit from the scheme directly or indirectly, then Division 165 is engaged. Different parts of the scheme may, and often will, have different principal effects.
 - (ii) Subsection 165-15(1) applies in relation to the consideration of the effect of a part of the scheme as if that part of the scheme were the scheme itself (subsection 165-15(2)).
5. There is no question that Manila Exchange's involvement in the scheme was an important aspect of the scheme as a whole. It participated in the scheme to benefit from receiving and not remitting GST. There is little doubt, therefore, that it was a central purpose of Manila Exchange to create a taxable supply by adulterating the bullion that it had purchased. That does not mean that other parties had that

¹² Full Federal Court decision at [67] and [96].

¹³ Full Federal Court decision at [75].

¹⁴ Full Federal Court decision at [78(1)].

¹⁵ Full Federal Court decision at [78(2)].

purpose or that the principal effect of various parts of the scheme could be put to one side.¹⁶

6. It would be an error to assume that, because Manila Exchange wanted to obtain (and not remit) the GST embedded in its supplies of scrap gold, it was not possible that its purpose, ascertained in accordance with Division 165, was to ensure that CSS could obtain ITCs on a GST-free sale. Indeed, it would be open to conclude that the purpose of obtaining (and not remitting) GST and the purpose of obtaining ITCs for CSS were one purpose if the facts showed them to be inextricably linked. Such a conclusion might be open, for example, if it were concluded that it was important to Manila Exchange that the scheme end with a GST-free supply by an entity which would be refunded ITCs, so that the scheme as a whole would work by being sufficiently funded.¹⁷
7. In a case where there is no express or clear finding that each of the participants in the scheme acted in concert or were commonly controlled, it cannot be assumed that every participant had the same dominant purpose.¹⁸
8. Division 165 requires the analysis of the purposes of each participant in the scheme and does not require the identification of which of the several different purposes of several different participants is the more significant.¹⁹
9. The mere fact that CSS is entitled to obtain an ITC on its acquisition of adulterated gold is not necessarily inconsistent with the object or purpose of the GST Act in circumstances where CSS was not a party to, and had no involvement with or knowledge of, the deliberate adulteration of the gold and the fraud perpetrated by Manila Exchange. However, CSS's entitlement to ITCs may not be consistent with the object and purpose of the GST Act if its supplier and the arranger of CSS's export sales – namely, PMMS – was a party to, had knowledge of, or was wilfully blind to that deliberate adulteration and fraud.²⁰
10. The AAT's reasoning that GB Traders and PMMS could have made the same profit or obtained the same benefit by selling to a refiner or export customer rather than CSS was not sound. Division 165 does not cease to apply because the same scheme might have been entered into with another entity. Section 165-5 requires a conclusion to be drawn in respect of the actual participants in the scheme and section 165-15 requires an examination of factors that relate to the scheme that was in fact entered into or carried out. Whether the same benefit might have been obtained by entering into a different scheme is not a matter to be considered under section 165-15.²¹

¹⁶ Full Federal Court decision at [82].

¹⁷ Full Federal Court decision at [85].

¹⁸ Full Federal Court decision at [96].

¹⁹ Full Federal Court decision at [102].

²⁰ Full Federal Court decision at [104].

²¹ Full Federal Court decision at [108–109].

The Full Federal Court held that the AAT made 2 errors in respect of its decision on the Second Period Division 165 issues concerning the application of paragraph 165-5(1)(c) in not:

1. separately examining and reaching a conclusion about each entity's purpose, whether by focusing on each entity's participation in the scheme as a whole or in relation to particular parts of the scheme²², or
2. examining and reaching a conclusion about the principal effect of the various parts of the scheme.²³

The Full Federal Court observed that, on the evidence before the AAT and if the AAT had considered the purpose and involvement of PMMS in entering into the scheme or parts of it in the manner contemplated by Division 165, the AAT may have concluded that PMMS had the requisite dominant purpose of enabling CSS to obtain a GST benefit²⁴, and that the principal effect of the part of the scheme in which PMMS was involved was to secure ITCs for CSS.²⁵

The Full Federal Court held that the Commissioner's appeal be allowed and the Second Period Division 165 issues be remitted to the AAT for reconsideration.²⁶

First Period issues

CSS cross-appealed the AAT's decision in respect of the First Period on the contention that it was denied procedural fairness in respect of the AAT's finding that it had not discharged its burden of proving that each of ABCRA and La Gajjar was a dealer in precious metal in circumstances where certain documents were not produced.²⁷ CSS also contended that the AAT made an error of law in its conclusion concerning penalties.²⁸

The Commissioner did not accept that there was a denial of procedural fairness in relation to the AAT's finding, but having reviewed the material before him on appeal, the Commissioner accepted that ABCRA was a dealer in precious metal, that the supplies by CSS to ABCRA were of precious metals, and therefore that the issues concerning the First Period had to be remitted to the AAT for reconsideration.²⁹ The Commissioner denied that the AAT had made any errors in addressing the issue of penalties but accepted that because the matter had to be remitted to the AAT for reconsideration of the assessments of net amount, it was appropriate for the penalties also to be remitted for reconsideration.³⁰

The Full Federal Court held that the issues concerning the First Period be remitted to the AAT for reconsideration.³¹

ATO view of decision

Second Period Division 165 issues

The Commissioner considers that the Full Federal Court's decision supports the proposition that the cancellation of the avoider's GST benefit under Division 165 is

²² Full Federal Court decision at [80] and [96].

²³ Full Federal Court decision at [124].

²⁴ Full Federal Court decision at [99], [115] and [122].

²⁵ Full Federal Court decision at [125].

²⁶ Full Federal Court decision at [126].

²⁷ Full Federal Court decision at [44–45].

²⁸ Full Federal Court decision at [51].

²⁹ Full Federal Court decision at [46].

³⁰ Full Federal Court decision at [52].

³¹ Full Federal Court decision at [47] and [126].

not foreclosed by the absence of the avoider's knowledge about or wilful blindness to the actions of parties involved in entering into or carrying out the scheme as a whole, or various parts of it. Further, Division 165 will operate to cancel the avoider's GST benefit where the relevant matters in section 165-15 demonstrate that any one or more of the scheme participants, or a part of the scheme, had the dominant purpose or the principal effect of the avoider obtaining that GST benefit.

First Period issues

The Commissioner observes that the Full Federal Court's decision to remit the matter back to the AAT was consistent with the Commissioner's submissions.

Implications for impacted advice or guidance

The ATO is reviewing the impact of this decision on related advice and guidance products, including PS LA 2005/24.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued: 20 July 2023

Due date: 18 August 2023

Contact officer details have been removed as the comments period has expired.

Legislative references

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

Div 165

165-5(1)(c)

165-5(1)(c)(i)

165-5(1)(c)(ii)

165-15

Case references

STNK and Commissioner of Taxation [2021] AATA 3399

ATO references

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