

BRADY KING PTY LTD V COMMISSIONER OF TAXATION

Decision Impact Statement

Court Citation(s):

[2008] FCA 1918

2008 ATC 20-084

Venue: Full Federal Court of Australia

Venue Reference No: VID 140 of 2008

Judge Name: Heerey, Goldberg and Dowsett JJ

Judgment date: 26 June 2008

Appeals on foot:

No

Administrative Treatment (Implication on current Public Rulings and Determinations)

Relevant Rulings/Determinations:

GSTR 2000/21

GSTR 2006/7

GSTR 2006/8

Subject References:

GST

Margin scheme

Freehold interest

Consideration method

Valuation method

Précis

Outlines the Tax Office's response to this case which concerned the application of the GST margin scheme to sales of stratum units following the acquisition of an office building and its conversion into stratum units, and in particular whether the units were held or acquired before 1 July 2000.

Brief Summary of Facts

On 22 May 2000 the taxpayer executed a contract to purchase an office building for \$9,250,000. The contract entitled the taxpayer to enter the property upon payment of a deposit for the purpose of carrying out certain specified works and for marketing purposes. Settlement of the contract occurred on 25 October 2000 and the transfer was registered under the Transfer of Land Act 1958 (Vic) on 9 November 2000.

The taxpayer then converted the building to stratum units. The taxpayer obtained valuations of the stratum units as at 1 July 2000 prepared by a professional valuer. The taxpayer lodged GST returns disclosing GST on the margin calculated as the difference between the consideration for the sales of the units and the amounts specified in the valuation (in aggregate, \$23,232,000).

The Tax Office considered that the taxpayer was not entitled to use the valuation method for margin scheme purposes and issued assessments calculating GST on the margin calculated as the difference between the consideration for the sales of the units and the relevant proportion of the consideration for the taxpayer's acquisition of the office building.

In the alternative, the Tax Office submitted that the valuation obtained by the taxpayer did not satisfy the requirements of the Commissioner's determination (A New Tax System (Goods and Services Tax) Margin Scheme Valuation Requirements Determination (No.2) 2000 ('MSV 2').

Issues decided by the Court or Tribunal

The trial judge held that the taxpayer was not entitled to use the valuation method. The primary reason for the decision was that the stratum units did not exist at the valuation date, 1 July 2000, and therefore the taxpayer had not held or acquired them as at that date for the purposes of s 75-10(3) of the A New Tax System (Goods and Services Tax) Act 1999 ('the GST Act').

On appeal, both parties argued the trial judge was wrong to conclude that there had to be strict identity in judicial terms between what the taxpayer acquired and what it supplied. The Full Court agreed. Therefore it did not matter that the stratum units did not exist at the valuation date. However, the parties were in dispute as to whether, by virtue of having entered into, but not completed, the contract to purchase the property, the taxpayer held or had acquired the necessary interest in each stratum unit before 1 July 2000 for the purposes of s 75-10(3) of the GST Act. The Commissioner submitted that the stratum units were acquired at the time the taxpayer acquired the property from which those units were derived and that the property was acquired on completion of the contract.

The Full Court did not accept this submission. The Court held that once the primary judge's "precise judicial identity" approach was rejected it was not possible to ring fence the interest Brady King acquired under the contract from the

stratum units later supplied to the purchasers. The fee simple estate was itself derived from the interest under the contract; "the contract was the genesis or source of the appellant's interest in the stratum unit it supplied".

The Full Court remitted the matter to the trial judge to determine the margin for the supply of the units having declared that the margin is to be calculated under s 75-10(3) of the GST Act. This was necessary because the trial judge did not address the issue of whether the taxpayer's valuations complied with MSV 2.

Tax Office view of Decision

The Commissioner will not apply for special leave to appeal to the High Court against the decision of the Full Court.

By virtue of s 75-5 of the GST Act, the margin scheme in Division 75 applies to certain supplies of particular kinds of real property, being a freehold interest in land, a stratum unit or long term lease (the 'relevant property'). The Tax Office considers that the Court's decision is authority for the proposition that, for the purposes of s 75-10 and s 75-11 of the GST Act, an entity supplying relevant property is taken to have held or acquired a sufficient interest in that property at a particular time if it had entered into, but not completed, a contract for its acquisition.

In particular, where, as in the Brady King case, an entity has entered into but not completed a contract for the acquisition of freehold title to land out of which stratum units are to be created, the entity is taken to have held or acquired a sufficient interest in the stratum units at that time.

Similarly, an entity that has entered into but not completed a contract for the acquisition of freehold title to land for subdivision is taken to have held or acquired a sufficient interest in the subdivided lots at that time.

However, the Tax Office does not consider that it follows from the decision that a supply or acquisition of the relevant property itself occurs at the time of entry into a contract for the sale and purchase of that property. The Tax Office continues to consider that a supply and acquisition of land under a standard land contract occurs upon completion of the contract.

In that regard, the Tax Office considers that it is important to note exactly what the Full Court decided. The Court decided that Brady King, by holding or acquiring contractual rights as the purchaser under an uncompleted contract of sale, held or acquired a sufficient interest in the relevant property for the purposes of Items 1 and 3 in s 75-10(3).

The Court did not decide that a taxable supply or creditable

acquisition of the relevant property itself occurs on entering into a contract. Such a conclusion would be contrary to the High Court's reasoning in *Commissioner of Taxation v Reliance Carpet Co Pty Limited* [2008] HCA 22 at [42] that, in the case of a completed contract for the sale of real property, there is only one taxable supply and that it occurs at completion of the contract.

The Court's decision was based strictly on its reasoning, having regard to the object of the margin scheme, that it was sufficient for the purposes of s 75-10(3) for the taxpayer to hold or have acquired a contractual interest as purchaser under an uncompleted contract at the valuation date. Accordingly, the Tax Office considers that the decision does not require Tax Office views in relation to other provisions (apart from s 75-11 to the extent that that provision refers to an interest, unit or lease being held or acquired at a particular time) to be changed.

Justice Middleton delivered his decision dismissing the taxpayer's appeal in relation to the valuation issue on 18 December 2008. The taxpayer has lodged a notice of appeal against that decision to the Full Court of the Federal Court.

Administrative Treatment

Implications on current Public Rulings & Determinations

The following public rulings will be amended to reflect the reasoning of the Full Court:

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GSTR 2006/7 Goods and services tax: how the margin scheme applies to a supply of real property made on or after 1 December 2005 that was acquired or held before 1 July 2000; and

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GSTR 2006/8 Goods and services tax: the margin scheme for supplies of real property acquired on or after 1 July 2000. If you believe you have overpaid GST based on the Tax Office's former view, you may be entitled to a refund of the overpaid GST, subject to the application of s 105-55 (Time limit on refunds and credits) and s 105-65 (Restrictions on refunds) in Schedule 1 to the Taxation Administration Act 1953 .

Implications on Law Administration Practice Statements
Nil.