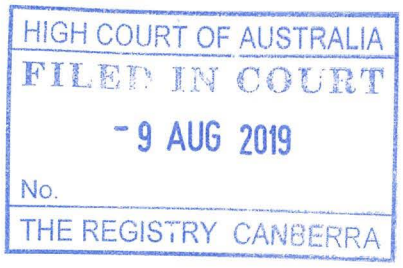
IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M 52 of 2019

BETWEEN: Commissioner of Taxation of the Commonwealth of Australia

Appellant

And



Sharpcan Pty Ltd

10 Respondent

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RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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Part I:

1. We certify that this outline is in a form suitable for publication on the internet.

Part II:

Section 8-1 (Mr Bloom QC)

2. The principal issue is whether the 18 Outgoings incurred on 10 May 2010 were on revenue or capital account. The question of deductibility turns on the particular circumstances in which the Outgoings were incurred by the Trustee, set out in detail in Greenwood ACJ's judgment and summarised at **RS [5]-[23]**. Importantly:
   a) the Trustee conducted an integrated hotel business, of which gaming was just one entertainment option (**RS [6], [14]**);
   b) from the time the Trustee acquired the hotel business it derived income from the conduct of gaming on the 18 machines on its premises. That income stream made the income from other activities "more robust" (**RS [13], [14]**); and
   c) as a result of the allocation of the 18 gaming machine entitlements (**GME's**) the activities conducted at the hotel remained the same before and after August 2012 when the Tatts/Tabcorp duopoly ceased and gaming on machines was opened to competition. As the Appellant accepted, conducting the business of the Royal hotel without any GME's represented a major threat to the revenues and profitability of the hotel (Greenwood ACJ [32] [**CAB50-51**], [233] [**CAB97**]).

3. The Respondent principally relies upon four propositions for the conclusion that the Outgoings are on revenue account. First, the focus of the enquiry is on the character of the advantage sought by the making of the expenditure rather than on what was obtained by the expenditure; although the nature of what was obtained will inform the former: *Commissioner of Taxation v Citylink Melbourne Limited* (2006) 228 CLR 1 [**Vol 6, Tab 14**] at [148]; *AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation* (2015) 255 CLR 439 [**Vol 6, Tab 9**] at [22]-[23] (the plurality) and [73]-[74] (Gageler J): **RS [24(a)]**. Here allocation of a GME was only sought for each of the 18 machines already operating on the premises: the advantage sought was not the allocation of the GME itself but rather the continued earning of income, direct and indirect, from the conduct of gaming on each of those 18 machines already in the hotel: **RS [26]-[27]**.

4. The second proposition is that expenditure incurred to meet an obstacle or difficulty which has arisen in the course of conducting an ongoing business and which is aimed at enabling the taxpayer to carry on the same business, unfettered by that obstacle or difficulty has been held to be on revenue account: *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 [**Vol 7, Tab 21**]; *Federal Commissioner of Taxation v Snowden & Willson Pty Ltd* (1958) 99 CLR 431 [**Vol 6, Tab 16**]; *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213 [**Vol 7, Tab 23**]; and *BP Australia Ltd v Commissioner of Taxation* (1965) 112 CLR 386 [**Vol 6, Tab 11**]: **RS [24(e)], [28], [30]**.

5. The third proposition is that the timing of an Outgoing is important: *cf. Ausnet* [**Vol 6, Tab 9**] per the plurality at 453, [19]: **RS [24(b)]**. Here each Outgoing was incurred in the course of an ongoing business.

6. The fourth proposition is that the true nature of an asset needs to be examined in order to determine whether its nature can be described as "enduring" for the purposes of applying what has been said in the cases: *cf. Citylink* [**Vol 6, Tab 14**], where contractual rights to operate a toll road were to last for over 30 years but were nonetheless held to be on revenue account: [100], [152]-[154] (**RS [31]**). Against the submission that a GME was relevantly "enduring" are its nature as statutory rights inherently capable of variation; its limited transferability; the fact that whilst on its face it is granted for ten years with a possible, but once only, two year extension, it is not otherwise renewable; and the fact it is subject to divestment and even extinguishment in certain circumstances: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [144]-[147] [**Vol 8, Tab 35**] per Hayne, Keifel and Bell JJ.

Section 40-880 (Mr Murphy QC)

7. Subsection 40-880(6) has three key features. They are:

a) the repeated use of the term *"you"*, which focuses the subsection on the taxpayer and its circumstances. It follows that *"the expenditure you incur to preserve but (not enhance) the value of the goodwill"* and *"the value to you of the right"* are to be determined by reference to the taxpayer and not by reference to "the expenditure" or "the right" taken in isolation. With respect, the Appellant's (and Thawley J's) reliance on the effect of the expenditure is misconceived (**RS [37(a)]** and **[37(c)]**; *cf* **AS [49]**, **Rep [8]**, Thawley J [324] [**CAB125**]);

b) unlike s 76ATI of the *Stamp Act 1921* (WA) considered in *Commissioner of State Revenue (WA) v Placer Dome Inc* (2018) 93 ALJR 65 [**Vol 6, Tab 13**], the subsection does not require *"the value of goodwill"* or *"the value to [the taxpayer] of the right"* to be quantified. The relevant concepts are goodwill "as property" and "the value of goodwill" as set out in *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 [**Vol 6, Tab 15**] at [23] and [48], as considered in *Placer Dome* at [65]-[90] [**Vol 6, Tab 13**]. With respect, the Appellant's distinction between "goodwill" and "going value", "trading income and profits", "the income stream" and "earning capacity" (**AS [42]**, **[43]** and **[61]; Rep [10]**, **[12]** and **[13]**) is misplaced, given s 40-880(6) is concerned with the "value of goodwill", which is *"tied to the fortunes of the business"* and *"varies with the earning capacity of the business"* (*Murry* [**Vol 6, Tab 15**] at 624 [48]); and

c) the term "value" is used in relation to two discrete CGT assets, namely the taxpayer's goodwill and its legal or equitable right. The Appellant wrongly conflates them in asserting that the purpose of the Trustee was not to preserve the value of goodwill because it was to acquire the rights (**AS [54]** and **[57]**; **Rep [8]** and **[12]**).

8. The Outgoings are deductible under s 40-880(2) (by application of s 40-880(6)) because:

a) the Tribunal made a finding that the Trustee incurred the Outgoings to preserve the value of goodwill: [26] [**CAB23**]. The Tribunal did not find that the Trustee incurred the Outgoings to enhance its goodwill (**RS [39]**). Its finding that the 10 year term of the GME's had the effect of enhancing goodwill was not a finding as to Trustee's purpose in incurring the Outgoings (*cf* Thawley J [327] [**CAB126**]). As Greenwood J said at [241] [**CAB99**], the incurring of the Outgoings was the *"very means of preserving the goodwill"*; and

b) for the same reason, the value of the GME's to the Trustee was solely attributable to the effect that they had on goodwill (**RS [41]-[44]**).

Dated: 9 August 2019

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