

AMERICAN EXPRESS WHOLESALE CURRENCY SERVICES PTY LTD v. COMMISSIONER OF TAXATION (S238/2010)
AMERICAN EXPRESS INTERNATIONAL INC v. COMMISSIONER OF TAXATION (S239/2010)

Court appealed from: Full Court of the Federal Court of Australia
[2010] FCAFC 122

Date of judgment: 17 September 2010

Date of referral to the Full Court: 11 February 2011

The proceedings in the Federal Court were commenced in February 2007 as appeals under Part IVC of the *Taxation Administration Act* 1953 against the disallowance of objections to assessments of net amounts of GST payable by the applicants.

The proceedings involve the determination of an entitlement to input tax credits under the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ('the GST Act'). Specifically, they concern the treatment of payments to American Express International Inc by the holders of charge cards and credit cards following the cardholders' defaults.

The applicants are related companies whose position is relevantly the same in relation to the principal question of entitlement to input tax credits. Their position is that they are entitled to an input tax credit for a proportion of the goods and services tax ('GST') said to be embedded in the creditable acquisitions that they have made. Their dispute with the Commissioner of Taxation concerns the proper calculation of the "extent of creditable purpose" under s 11-30(3) of the GST Act – that is, the calculation to be applied in determining the entitlement to input tax credits with respect to certain acquisitions.

Under the GST Act, taxpayers are entitled to input tax credits on "creditable acquisitions", and an acquisition can be fully creditable, partly creditable, or not creditable, depending, among other things, on the purpose for which the taxpayer makes the acquisition. In order to have an input tax credit, the taxpayer must have a "creditable purpose" as defined.

On 19 June 2009 Emmett J upheld the appeals against the Taxation Commissioner's disallowance, set aside the Commissioner's objection decisions and remitted the matters to the Commissioner. The Commissioner appealed these decisions. When the appeals were called on for argument before the Full Federal Court (Dowsett, Kenny and Middleton JJ) on 26 November 2009 counsel for the Commissioner moved for leave to amend both notices of appeal. By majority (Kenny and Middleton JJ) the Full Court allowed the appeals and allowed leave to amend the notices of appeal.

The questions of law said to justify the grant of special leave include:

- Is the contract between the first applicant (Amex) and each of its cardholders whereby the cardholder has the "right to present the card as payment for goods and services "the supply of" anything that is recognized in law or in equity as property in any form?
- Did the majority err in permitting the respondent to amend its grounds of appeal?