COMMISSIONER OF TAXATION v QANTAS AIRWAYS LTD (S47/2012)

Court appealed from: Full Court of the Federal Court of Australia
[2011] FCAFC 113

Date of judgment: 1 September 2011

Special leave granted: 10 February 2012

When selling domestic airline travel, Qantas Airways Ltd ("Qantas") and its subsidiaries make reservations and issue tickets in exchange for payment. The tickets are subject to fare rules, which provide that certain classes of ticket entitle the customer to a full refund if he or she does not take the flight. Qantas included in its monthly Business Activity Statements ("BAS") to the Commissioner of Taxation ("the Commissioner") the GST on all fares it had received, including payments for flights that were not taken. The Commissioner issued assessments of Qantas' net tax owed for the months from July 2005 to June 2008, based on the BAS. Qantas objected to the inclusion of GST on fares for flights which had not been taken. On 9 October 2009 the Commissioner disallowed that objection. Qantas then applied to the Administrative Appeals Tribunal ("AAT") for review of the Commissioner's decision.

On 6 December 2010 the AAT (Downes J, President, & S E Frost, Senior Member) affirmed the Commissioner's decision. The AAT held that Qantas had made a "supply" for the purposes of s 9-5 of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the Act"). The AAT found that contractual rights and obligations were entered into either when a reservation was made or at the time of payment. This constituted a "supply of services" (within the ordinary meaning of the word "supply") as defined in s 9-10(2)(b) of the Act by Qantas holding itself ready to carry a passenger on a flight. The AAT also found that Qantas had made a supply under both s 9-10(2)(e) by granting a right and s 9-10(2)(g) by entering into an obligation. Consequently there was a "taxable supply" within the meaning of s 9-5 of the Act and GST was payable under s 7-1 on every fare received. This was regardless of whether the flight had been taken or Qantas had refunded money to the customer.

On 1 September 2011 the Full Court of the Federal Court (Stone, Edmonds & Perram JJ) unanimously allowed Qantas' appeal. Their Honours held that when a customer failed to fly, nothing in the Act converted the making of the contract into a taxable supply. The Full Court also held that the purpose of the transaction was important in identifying the relevant supply. Their Honours found that the sole purpose of the transaction was carriage by air. Therefore the relevant supply was the contemplated flight, not the reservation. If the flight was not taken, there was no taxable supply. The Full Court held that the AAT had erred in identifying other acts capable of meeting the Act's definition of a supply, as those were not acts for which the customer contracted.

The grounds of appeal include:

- The Full Court erred in finding that the Respondent did not make a taxable supply within the meaning of s 9-5 of the Act in circumstances where passengers made and paid for reservations or bookings for flights which they subsequently did not take.

- The Full Court erred in holding that in the transactions the subject of the proceedings, where the Respondent received a fare but did not supply to the customers “carriage by air”, the only supply agreed to be made by the Respondent to its customers was the “actual travel”, as the “essence and sole purpose of the transaction” and “nothing more or less”.

On 29 February 2012 the Respondent filed a notice of contention, the grounds of which include:

- The Full Court ought to have found that there was no “supply for consideration” within the meaning of paragraph 9-5(a) of the Act where the passenger cancels the booking or does not turn up for the flight and does not receive a refund where it was a condition of the booking that the passenger was entitled to a full refund of the prepaid fare.