



**Administrative  
Appeals Tribunal**

**DECISION AND  
REASONS FOR DECISION**

**The Trustee for the Whitby Trust and Commissioner of Taxation  
(Taxation) [2017] AATA 343 (20 March 2017)**

Division: **TAXATION & COMMERCIAL DIVISION**

File Number: **2015/3625**

Re: **The Trustee for the Whitby Trust**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

**DECISION**

Tribunal: **Senior Member CR Walsh**

Date: **20 March 2017**

Place: **Perth**

The Tribunal:

- (i) sets aside the Commissioner's objection decision, dated 21 May 2015, in part, and remits the matter to the Commissioner for reconsideration in accordance with the recommendation that the Commissioner issue the Applicant with amended GST and penalty assessments in accordance with the agreement reached between the parties, as set out in paragraph 9 of the following Reasons for Decision; and
- (ii) otherwise affirms the Commissioner's objection decision, dated 21 May 2015.

.....[Sgd].....

Senior Member CR Walsh

## CATCHWORDS

*GOODS AND SERVICES TAX – margin scheme – real property acquired following exercise of a call option – whether option fee forms part of the consideration for the acquisition of the real property for the purpose of applying the margin scheme – objection decision set aside in part and remitted to Commissioner for reconsideration in accordance with recommendation set out in the Tribunal's reasons for decision – objection decision otherwise affirmed*

## LEGISLATION

*A New Tax System (Goods and Services Tax) Act 1999 – s 7-1(1) – s 9-5 – s 9-10(1) – s 9-10(2) – s 9-15(1)(a) – s 9-15(3) - s 9-17(1) - s 9-40 – s 9-75 – s 75-5 – s 75-5(1)(a) - s 75-10 - s 75-10(2) – s 182-1(1) - s 195-1 - Chapter 2 – Division 75 - Chapter 4*

*Duties Act 2008 (WA)*

*Income Tax Assessment Act 1936 – s 264*

*Income Tax Assessment Act 1997 – s 108-5*

*Taxation Administration Act 1953 – s 14ZZK – s 284-75(1) - s 284-75(3) – s 284-90 - s 284-220 – s 353-10*

## CASES

*BHP Billiton Direct Reduced Iron Pty Ltd v Deputy Commissioner of Taxation* (2007) 99 ALD 149; [2007] FCA 1528

*Carter v Hyde* (1923) 33 CLR 115

*Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127

*CTI Joint Venture Co Ltd v Chief Commissioner of Revenue* (2013) 87 ATR 709; [2013] NSWSC 20

*Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674

*HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553; [2005] FCAFC 126

*Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57

*Leafs Gully Farm Pty Limited v Mitchell* (2015) 18 BPR 35, 6057; [2015] NSWSC 1460

*O'Halloran Enterprises Pty Ltd v Farr* [1979] VR 33

*Reliance Carpet Company Pty Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 433

*Ross Nielson Properties Pty Ltd v Orchard Capital Investments Ltd* [2013] 1 Qd R 72; [2011] QCA 49

*Saga Holdings Ltd v Federal Commissioner of Taxation* (2006) 156 FCR 256; [2006] FCAFC 191; 2006 ATC 4841

*Sterling Guardian Pty Ltd v Commissioner of Taxation*(2005) 220 ALR 550; 2005 ATC 4796

*Westminster Estates Pty Ltd v Calleja* [1970] 1 NSW 526

## **SECONDARY MATERIALS**

*DG Hill, Some thoughts on the principles applicable to the interpretation of the GST* (2004) 6 Journal of Australian Taxation 1(2003) 6(1) Journal of Australian Taxation 1  
*Explanatory Memorandum to A New Tax System (Goods and Services Tax) Bill 1998 – paragraph 3.9*

*Goods and Services Tax Determination GSTD 2014/2 - “Goods and Services tax: where real property is acquired following exercise of a call option, does the call option fee form part of the consideration for the acquisition for the purposes of subsection 75-10(2) of A New Tax System (Goods and Services Tax) Act 1999?”*, dated 5 February 2014

*Macquarie Dictionary, Sixth Edition, 2013, Macquarie Dictionary Publishers Pty Ltd, Sydney Australia – p 217 – p 1033*

*N Seddon, R Bigwood, M Ellinghouse, Cheshire and Fifoot Law of Contract, 10<sup>th</sup> ed., Reed Internationals Books Australia Pty Limited , trading as LexisNexis, 2012, pp 162-164*

*Taxation Ruling TR 2006/10 – “Public Rulings (As at 12 October 2016)”*

## **REASONS FOR DECISION**

**Senior Member CR Walsh**

**20 March 2017**

## INTRODUCTION

1. This application concerns the “margin scheme” rules in Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* which allow the calculation of the goods and services tax (**GST**) liability attaching to certain sales of real property to be based, not on the amount of consideration for the supply (as is the general liability rule), but, rather, on the difference between the consideration for the supply and the cost of its acquisition (i.e. on the “margin” on the sale). Consequently, use of the “margin scheme” rules will provide a lower GST cost to the supplier than would be the case under the general provisions of the GST Act.
2. On 7 December 2005, Whitby Land Company Pty Ltd<sup>1</sup>, as trustee for the Whitby Trust<sup>2</sup> (**Whitby**) entered into a Deed of Option with Ms Maria Jabado (**Owner**) for an option to purchase Lot 22 on Diagram 45151, more commonly known as 293 Nicholson Road, Forrestdale, Western Australia (**Lot 22**), for a “Purchase Price” of \$28,000,000, inclusive of a non-refundable option fee of \$2,000,000 payable in tranches (**Option Deed**). The particulars of the Option Deed are discussed in detail later in these Reasons for Decision.
3. On 15 November 2007, Whitby exercised the call option in the Option Deed and, on 16 January 2008, it became the registered proprietor of Lot 22.
4. Whitby subsequently developed Lot 22, subdividing it into residential lots and selling the lots to third parties.
5. At issue is whether the option fee of \$2,000,000, payable by Whitby to the Owner under the Option Deed, forms part of the acquisition cost of Lot 22 when determining Whitby’s “margin” on the sale of the subdivided residential lots to third parties in applying the “margin scheme” rules in Division 75 of the GST Act. The total amount of tax in dispute in this case is \$5,414,019.

---

<sup>1</sup> The directors of Whitby are Allen Caratti, Liang Li and Christina Caratti.

<sup>2</sup> Being a discretionary trust established by trust deed, dated 27 July 2005.

6. In short, Whitby's position is that the option fee (of \$2,000,000) should be included in the acquisition cost of Lot 22 when applying the "margin scheme".<sup>3</sup> The Commissioner disagrees, contending that the acquisition cost of Lot 22 is \$26,000,000 (being \$28,000,000 less the \$2,000,000 option fee). Broadly, the Commissioner contends this on the basis that, in this case, there are two separate taxable supplies under the GST Act. That is, the supply of an option (i.e. a bundle of rights) from the Owner to Whitby for consideration of \$2,000,000 and the supply of Lot 22 (the real property/land itself) from the Owner to Whitby for consideration of \$26,000,000. For the following reasons, the Tribunal agrees with the Commissioner's construction.

### ISSUES

7. Prior to hearing, the following five issues were in dispute between the parties:
- (i) the correct identity of the entity carrying on the enterprise of developing Lot 22 (i.e. of subdividing Lot 22 into residential lots for sale to third parties);
  - (ii) whether the \$2,000,000 option fee forms part of the acquisition cost of Lot 22 in applying the "margin scheme" rules in Division 75 of the GST Act to the sale by Whitby of the subdivided residential lots;
  - (iii) whether the land area used for the purpose of calculating the unit cost of the subdivided lots has been calculated correctly for the purpose of applying the "margin scheme" rules in Division 75 of the GST Act;
  - (iv) whether Whitby was entitled to further input tax credits in the monthly tax periods from 1 May 2011 to 31 December 2013; and
  - (v) whether the penalties imposed on Whitby by the Commissioner in this case should be reduced or otherwise be remitted in whole or in part.
8. However, at the commencement of the hearing, the parties advised the Tribunal that issues (i), (iii), (iv) and (v), above, were no longer in dispute and that the only live issue remaining was issue (ii) above, namely whether the \$2,000,000 option fee forms part of the acquisition cost of Lot 22 in applying the "margin scheme" to the sale by Whitby of the subdivided residential lots (derived from Lot 22) to third parties.

---

<sup>3</sup> Pursuant to s 14ZZK of the *Taxation Administration Act 1953*, the Applicant has the burden of proving this and, it follows, that the relevant assessments are excessive.

9. More specifically, the parties informed the Tribunal that, in relation to;
- issue (i) above, it is no longer in dispute that Whitby is the taxpayer who carried on the enterprise of developing Lot 22;
  - issue (iii) above, the parties are in agreement that the correct land area, for the purpose of calculating the unit cost of the subdivided lots for the purpose of applying the “margin scheme” rules in Division 75 of the GST Act is 281,691m<sup>2</sup>;
  - issue (iv) above, Whitby no longer contends that it was entitled to further input tax credits in the relevant tax periods; and
  - issue (v) above, the parties are in agreement that it is appropriate for the Commissioner to recalculate the penalty attributable to the misapplication of the “margin scheme” arising from their agreement that the correct land area is 281,691m<sup>2</sup> (i.e. issue iii above). This will require the Tribunal to remit the matter to the Commissioner so that amended assessments may be issued to Whitby in accordance with the parties’ agreement.

## **FACTUAL & PROCEDURAL BACKGROUND**

### **Audit and assessments**

10. The Commissioner undertook an audit of Whitby in 2012, as a result of which, on 27 November 2012, it issued assessments to Whitby, in its own right (i.e. not as trustee for the Whitby Trust) for the quarterly tax periods from 1 April 2011 to 30 June 2012. Whitby objected to these assessments on the basis that it held Lot 22 as trustee for the Whitby Trust and that any enterprise it carried on in the relevant tax periods was in its capacity as trustee for the Whitby Trust. The Commissioner accepted this and, in May 2013, allowed all of the objections in full.
11. On 22 August 2013, the Commissioner advised Whitby that he was commencing an audit for both GST and income tax for the period 1 July 2010 to 30 June 2013.
12. On 22 August 2013, the Commissioner issued Whitby with a notice under s 264 of the *Income Tax Assessment Act 1936* and under s 353-10 of the *Taxation Administration Act 1953 (TAA)*, requiring Whitby to provide him with certain information and documents by 23 September 2013. Whitby did not comply with this notice.

13. The Commissioner subsequently issued Whitby with a series of assessments and amended assessments for GST for the monthly tax periods identified in the assessments, as follows:

- notices of assessments for GST for monthly tax periods from 1 May 2011 to 30 November 2012, issued on 22 August 2013 (totalling \$2,055,125);
- notice of assessment for GST for the monthly tax periods from 1 January 2013 to 31 October 2013, issued on 10 December 2013 (totalling \$2,149,651);
- notice of assessment for GST for the monthly tax periods from 1 November 2013 to 31 December 2013, issued on 24 January 2014 (\$377,850);
- notice of amended assessment for GST for the monthly tax period from 1 May 2013 to 31 May 2013, issued on 24 January 2014 (amending the net amount payable from \$525,250 to \$513,750); and
- notice of amended assessment for GST for the monthly tax periods from 1 May 2011 to 31 July 2013 and 1 October 2013 to December 2013, issued on 30 June 2014 (resulting in an additional GST liability of \$831,394) (**GST Assessments**).

14. The Commissioner also issued Whitby with a series of penalty assessments for the monthly tax periods identified in the assessments, as follows:

- notice of assessments of penalty for failing to provide a document for the monthly tax periods from 1 January 2013 to 31 October 2013, issued on 13 December 2013 (totalling \$1,923,532.50);
- notice of assessments of penalty for failing to provide a document for the monthly tax periods from 1 November 2013 to 31 December 2013, issued on 29 January 2014 (totalling \$340,065);
- notice of assessments of penalty for failing to provide a document for the monthly tax periods from 1 May 2011 to 30 June 2012, 1 January 2013 to 31 July 2013 and 1 October 2013 to 31 December 2013, issued on 6 August 2014 (totalling \$1,564,901.10); and
- notice of assessments of shortfall penalty for the monthly tax periods from 1 July 2012 to 30 September 2012, issued on 6 August 2014 (totalling \$223,908.60) (**Penalty Assessments**).

15. The Penalty Assessments imposed:

- a base penalty of 75% of the tax related liability under s 284-75(3) of Schedule 1 to the TAA for failing to lodge business activity statements (**BAS**) for each of the monthly tax periods ending 31 May 2011 to 30 June 2012, 31 January 2013 to July 2013 and 31 October 2013 to 31 December 2013;
- a 20% increase to the base penalty amount under s 284-220 of Schedule 1 to the TAA for each of the monthly tax periods ending 30 June 2011 to 30 June 2012, 31 January 2013 to July 2013 and 31 October 2013 to 31 December 2013;
- a base penalty of 50% of the taxation shortfall for making statements which were false and misleading in each of the monthly tax periods ending 31 July 2012, 31 August 2012 and 30 September 2012 pursuant to s 284-75(1) and s 284-90 of Schedule 1 to the TAA; and
- a 20% increase to the base penalty amount under s 284-220 of Schedule 1 to the TAA for each of the monthly tax periods ending 31 July 2012, 31 August 2012 and 30 September 2012.

**Objection and review**

16. On 6 February 2015, Whitby objected to the GST Assessments and the Penalty Assessments (**Objection**).
17. On 10 March 2015, Whitby amended its grounds of objection, as stated in the Objection, in relation to the acquisition cost of Lot 22, as follows:

*...the Taxpayer wishes to remove paragraphs 5 to 10 of the reasons for objection to GST, Administrative Penalty and General Interest Charge of the Taxpayer, dated 6 February 2015, and replace them with the following paragraphs:*

...

7. *The margin scheme is the amount that the consideration for the supply exceeds the consideration for the acquisition of the interest in question (section 75-10(2) of the GST Act).*
8. *The Taxpayer acquired the land by exercise of a call option which was granted over the land by Maria Jabado on 7 December 2005.*
9. *The Taxpayer is entitled to include the option fees paid to Maria Jabado as consideration for the acquisition of the land for the purposes of calculating the applicable "margin" under the margin scheme.*

...

18. On 21 May 2015, the Commissioner disallowed the Objection in full (**Objection Decision**). The "Reasons for decision", attached to the Objection Decision, state:

*Division 75 of the GST Act allows you to apply the margin scheme when calculating the GST payable on real property. At audit we determined that you were eligible to apply the margin scheme to the sale of the lots of the property. In your letter dated 10 March 2015, you advised that we have allowed the margin scheme on the sale of the lots of the property; however you contend that the call option fee should be included in margin scheme calculations.*

*Goods and Services Tax Determination GSTD 2014/2 Goods and services tax: where real property is acquired following the exercise of a call option, does the call option fee form part of the consideration for the acquisition for the purposes of subsection 75-10(2) of A New Tax System (Goods and Services Tax) Act 1999? gives clear guidance on the Commissioner's view on call option fees for margin scheme purposes.*

*Paragraph 1 of GSTD 2014/2 states the call option fee does not form part of the consideration for the purposes of subsection 75-10(2) of the GST Act. Paragraph 4 states:*

*The supply of a the (sic.) call option and the supply of the vacant land are two separate supplies as a consequence of subsection 9-17(1), the consideration for the supply of the vacant land is limited to any consideration provided in addition to the call option fee.*

*Therefore you cannot apply the consideration for the call option to determine the consideration paid for the property for margin scheme purposes. You may be entitled to ITCs on the call option fee if the supply meets the requirements to be a creditable acquisition to you; however as the call option was exercised in 2005 the time limits under section 105-55 of Schedule 1 to the TAA will need to be considered by you. We note from the documents available to us the recipient was not registered at the time of the supply of the call option fee being made to you.*

*Your objection had been disallowed.*

19. On 17 July 2015, Whitby applied to the Tribunal for review of the Objection Decision.

#### **Option Deed and the transfer of Lot 22**

20. The Option Deed (T17, pp 118-121) provides:

##### **OPERATIVE PART**

*The Owner hereby grants to the Option Holder the exclusive option ("the Option") to purchase the property described in Item 1 of the schedule ("the Property") subject to the encumbrances (if any) mentioned in Item 2 of the schedule but otherwise free from encumbrances for the price mentioned in Item 3 of the schedule ("the Purchase Price") on the following terms and conditions:*

1. *The Option is exercisable by written notice given by the Option Holder to the Owner at any time on or before 1 December 2007 ("the Option Period").*
2. (a) *The Option Holder shall be entitled to make application in the name*

- Of the Owner and the Owner will lend its name and provide all necessary co-operation (including signing all required applications and other forms) for all necessary approvals for any subdivision of the Property which the Option Holder shall wish to effect, including but not limited to, a subdivision in association with adjacent lands.*
3. (b) *All costs of and incidental to seeking approval for any subdivision of the Property shall be borne by the Option Holder.*
- (a) *As consideration for the grant of the Option, a **non-refundable option fee of two million dollars (\$2,000,000.00) (the "Option Fee")**, which forms part of the Purchase Price, shall be payable by the Option Holder to the Owner in the following manner:*
- (i) *On 1 July 2006 a payment of \$550,000.*
- (ii) *On 1 August 2006 and on the first day of each month up to and including 1 December 2006 equal payments of \$50,000.*
- (iii) *On 1 January 2007 and on the first day of each month up to and including 1 December 2007 equal payments of \$100,000.*
- (b) *All payments made by the Option Holder to the Owner under this clause are non-refundable.*
- (c) *In the event that any of the payments due under this clause remain unpaid for seven (7) days (unless such default is brought about by bank error) the Option shall automatically expire. The Option Holder shall have no further rights in relation to the Property and the Option Holder shall have no further liability to the Owner to make any further payments. The Owner shall be entitled to keep all payments made by the option Holder.*
- ...
5. *During the Option Period the Owner will allow the Option Holder and the Option Holder's employees, agents and contractors reasonable access to the Property for the purposes of undertaking survey works, geotechnical tests and other works required to be carried out for the purposes of or in connection with the obtaining of approval to any subdivision of the Property.*
6. *In the event of exercise of the Option by the option Holder, the Owner shall sell an the Option Holder shall purchase the Property, for the Purchase Price less any payments made by the Option Holder pursuant to clause 3(a) thereof upon and subject to the following terms:*
- (a) *Settlement of the sale and purchase shall be effected within thirty (3) days of the date of exercise of the Option ("the Settlement Date");*
- (b) *The 2002 Joint form of General conditions for the Sale of Land (a copy of which is annexed hereto) shall apply to the sale of the Property.*
7. *The Option Holder shall be responsible for the payment of all rates (including without limitation all local authority and water rates) and all taxes (including without limitation Land Tax and Metropolitan Region*

*Improvement Tax) from time to time levied by any Local or Public Authority in respect of the Property from the date of this deed.*

8. *The Option Holder shall not be entitled to assign or transfer the benefit of the Option or any other rights of the Option Holder under this deed.*

#### SCHEDULE

...

3. **Purchase Price**

**\$28,000,000.00 (Inclusive of the Option Fee)**

(emphasis added)

21. On 15 November 2007, Whitby exercised the option and, on 16 January 2008, it became the registered proprietor of Lot 22.
22. Whilst the REIWA Contract for Sale or Strata Title by Offer and Acceptance, for the sale of Lot 22, is not in evidence, it is evident from the Transfer of Land for the transfer of Lot 22 from the Owner to Whitby, dated 15 January 2008 (**Transfer of Land**), that the Transfer of Land was stamped pursuant to an instrument dated 15 November 2007.
23. The Transfer of Land states that the "Consideration" for the transfer of the Property was \$28,000,000 and that the stamp duty paid on the transfer was \$1,404,000 (which represents the transfer duty paid on the "Consideration" amount of \$28,000,000 under the *Duties Act 2008 (WA)*).
24. By the end of the 2013 income year, 269 subdivided residential lots (derived from Lot 22) had been sold by Whitby to third parties for an amount totalling \$64,525,500. An additional 101 lots were sold by the end of the 2013 calendar year.

#### CONSIDERATION

##### GST Act

25. Chapter 2 of the GST Act sets out the "basic rules" for GST.
26. Section 7-1(1) of the GST Act provides that GST is payable on "taxable supplies" and s 9-40 of the GST Act imposes liability for GST on the entity that makes the taxable supply.
27. Section 9-5 of the GST Act provides:

### 9-5 Taxable supplies

You make a **taxable supply** if:

- (a) you make the supply for \* consideration; and
- (b) the supply is made in the course or furtherance of an \* enterprise that you \* carry on; and
- (c) the supply is \* connected with Australia; and
- (d) you are \* registered, or \* required to be registered.

However, the supply is not a \* taxable supply to the extent that it is \* GST-free or \* input taxed.

28. Section 9-10(1) of the GST Act provides that a “supply” is “any form of supply whatsoever” and s 9-10(2) of the GST Act provides that, without limiting s 9-10(1) of the GST Act, a “supply” includes:

- (d) a grant, assignment or surrender of \*real property;
- (e) a creation, grant, transfer, assignment or surrender of any right;
- ...
- (g) an entry into, or release from, an obligation:
  - (i) to do anything; or
  - ...

29. The amount of GST payable on a taxable supply is generally  $1/11^{\text{th}}$  of the GST inclusive consideration for the supply: s 9-75 of Chapter 2 of the GST Act.

30. Chapter 4 of the GST Act sets out “special rules” for GST.<sup>4</sup>

31. Relevantly, Division 75 of Chapter 4 sets out the “margin scheme” rules which, as previously stated, allow the calculation of the GST liability attaching to certain sales of real property to be based, not on the amount of consideration for the supply (as is the general liability rule in Chapter 2), but, rather, on the difference between the consideration for the supply and the cost of the acquisition (i.e. on the “margin” on the sale). Consequently, use of the margin scheme (which is optional and must be agreed upon, in writing, between the vendor and purchaser) will provide a lower GST cost to the supplier (vendor)

---

<sup>4</sup> Section 45-5 of the GST Act provides that the special rules in Chapter 4 of the GST Act override the general rules in Chapter 2 of the GST Act, but only to the extent of any inconsistency.

than would be the case under the general provisions of the GST Act. Accordingly, the “margin scheme” rules are commonly used by developers, like Whitby.<sup>5</sup>

32. Section 75-5 of the GST Act provides:

**75-5 Applying the margin scheme**

(1) *The \*margin scheme applies in working out the amount of GST on a \*taxable supply of \*real property that you make by:*

(a) *selling a freehold interest in land; or*

*...*

*if you and the \*recipient of the supply have agreed in writing that the margin scheme is to apply.*

33. Section 75-10 of the GST Act provides:

**75-10 The amount of GST on taxable supplies**

(1) *If a \*taxable supply of \*real property is under the \*margin scheme, the amount of GST on the supply is 1/11 of the \*margin for the supply.*

(2) *Subject to subsection (3) and section 75-11, the **margin** for the supply is the amount by which the \***consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question.***

(emphasis added)

34. “Consideration” is defined in the “Dictionary” in s 195-1 of the GST Act as follows:

**consideration**, for a supply or acquisition, means any consideration, within the meaning given by **sections 9-15 and 9-17**, in connection with the supply or acquisition.

*Note: This meaning is affected by sections 75-12, 75-13, 75-14, 78-20, 78-35, 78-45, 78-50, 78-65, 78-70, 79-60, 79-65, 79-80, 80-15, 80-55, 81-5, 81-10, 81-15, 82-5, 82-10, 99-5, 100-5, 100-12 and 102-5.*

(emphasis added)

35. Section 9-15(1)(a) of the GST Act provides that “consideration” includes:

(a) *any payment, or any act or forbearance, in connection with a supply of anything.*

---

<sup>5</sup> It is not in dispute that Whitby is eligible to apply the margin scheme to the sale of the residential lots derived from the subdivision of Lot 22.

36. There are specific exclusions from the definition of “consideration”. Relevantly, s 9-17(1) of the GST Act, titled “Certain payments and other things not consideration”, provides the following qualifications to the definition of “consideration” in s 9-15 of the GST Act:

- (1) *If a right or option to acquire a thing is granted, then:*
- (a) *the consideration for the supply of the thing on the exercise of the **right or option** is limited to any additional consideration provided either for the supply or in connection with the exercise of the right or option; or*
  - (b) *if there is no such additional consideration - there is no consideration for the supply.*

(emphasis added)

37. Paragraph 3.9 of the Explanatory Memorandum to *A New Tax System (Goods and Services Tax) Bill 1998 (EM)*, which passed as the GST Act, states the following in relation to the former s 9-15(3) of the GST Act, being the predecessor to s 9-17 of the GST Act<sup>6</sup>:

#### **Consideration**

...

3.9 **Section 9-15** defines consideration. Consideration for GST is broader than it is for contractual purposes. Consideration for GST is intended to be very broad and includes any:

- *payments, acts, refraining from acting or forbearance that are made for a supply;*
- *payments, acts, refraining from acting or forbearance that are made in response to a supply;*
- *payments, acts, refraining from acting or forbearance that are made to induce a supply; and*
- *payment for a supply even if paid by a person other than the recipient of the supply.*

***The supply of a right or option will be taxed when it is supplied. The later exercise of that right or option will be another supply. That later supply will not be taxable unless there is further consideration when the right or option is exercised. Subsection 9-15(3).***

(emphasis added)

#### **Options at common law**

---

<sup>6</sup> By items 1 and 2 of Schedule 2 to the *Tax and Superannuation Laws Amendment (2012 Measures No 1) Act 2012*, s 9-15(3) was repealed and replaced by s 9-17(1) and (2).

38. The phrases “right or option” and “right or option to acquire a thing”, as they appear in s 9-17(1), are not defined in the GST Act and, consequently, they take their ordinary meaning. Similarly, the word “option” is not defined in the GST Act and, accordingly, it takes its ordinary meaning.
39. The word “option” is defined in the *Macquarie Dictionary*<sup>7</sup> (at 1033) as follows:
5. Commerce, Stock Exchange *the right, obtained by payment, to buy or sell a specified commodity, parcel of shares, foreign exchange, etc., at a set price on or before a specified date. See call option, put option.*
40. The expression “call option”<sup>8</sup> is defined in the *Macquarie Dictionary* (at 217) as follows:
- n.* Commerce, Stock Exchange *the right to buy a specified commodity, parcel of shares, foreign exchange, etc., at a set price on or before a specified date. Compare put option.*
41. At common law, “options” have been described as “irrevocable offers” or, alternatively, as “conditional contracts”.
42. Under the “irrevocable offer” theory, there is a “mini contract” comprising the irrevocable offer, for which the option fee is consideration. This theory has been widely accepted: see, for example, e.g. *Carter v Hyde* (1923) 33 CLR 115; *Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127 (option fee not taxable as income from the sale of personal property); *O'Halloran Enterprises Pty Ltd v Farr* [1979] VR 33; *Westminster Estates Pty Ltd v Calleja* [1970] 1 NSW 526; *Leafs Gully Farm Pty Limited v Mitchell* [2015] NSWSC 1460 at [89].
43. The alternative “conditional contract” theory says that an option creates a conditional contract, being a contract that is conditional on the exercise by the grantee of the option of his or her right to purchase the land. Under this theory, the contract to purchase the land is immediately binding. This theory has also received substantial judicial support: e.g. *Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674; *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57.

---

<sup>7</sup> *Macquarie Dictionary*, Sixth Edition, 2013, Macquarie Dictionary Publishers Pty Ltd.

<sup>8</sup> It is common ground that the option in the Option Deed is a “call option”.

44. The debate as to which theory is preferable is ongoing at common law: see for example, *Ross Nielson Properties Pty Ltd v Orchard Capital Investments Ltd* [2011] QCA 49; [2013] 1 Qd R 72; *CTI Joint Venture Co Ltd v Chief Commissioner of Revenue* [2013] NSWSC 20 at [33].
45. Paragraph 3.56 of *Cheshire and Fifoot Law of Contract*<sup>9</sup> describes the longstanding, well over one hundred year, debate in the common law about the theory behind option contracts, as follows:

**3.56 Nature of option.** *Although options are very common, particularly in land dealings, the legal nature of an option has been a 'standing controversy' for over a hundred years. There are two theories: an option is an irrevocable offer that may be accepted at any time during the period specified; alternatively, an option is a conditional contract, usually of sale or lease. It seems that the particular wording of the option is not necessarily determinative of the court's choice.*

*On the first analysis, there are two contracts: a 'mini' contract to keep the offer open for certain time and the main contract of sale or lease that comes into being if the offer is accepted (when the option is 'exercised').*

*On the second analysis, there is one contract that comes into being immediately the offeree pays or promises to pay the sum of money (or alternative when the original contract of lease is created, in cases where the option is contained in a lease). On this analysis the contract is subject to a condition subsequent, that is, if the condition is not satisfied the contract terminates. It is thus, a contract for valuable consideration, viz, to sell the property (or whatever the subject matter may be) upon condition that the other party shall within the stipulated time bind himself to perform the terms of the offer embodied in the contract.*

*At first sight a contract that is subject to a condition that allows one of the parties to decide whether or not to be bound is a contradiction. It appears to be a denial of contract. This would be so if it were not for the consideration (often nominal) provided by the grantee of the option. By giving the consideration, the grantee commits himself or herself to a contract but at the same time buys the privilege of having the choice to decide within the stipulated time not to go ahead with the agreement. What is somewhat curious is that, on this analysis, there is an immediately binding contract, yet, unless the grantee takes positive steps to exercise the option (thereby satisfying the condition), the contract terminates automatically. It might be thought that, consistent with the notion of contract being set of binding obligations, the contract should remain in force unless the grantee does something positive to bring it to an end (as with an election to rescind) rather than terminate automatically unless the grantee does something positive to keep it on foot. Suffice it to say that the option, analysed as a conditional contract, is a curious creature in the law of contract, though it is far too well-established and familiar to business people to be looked at afresh.*

---

<sup>9</sup> N Seddon, R Bigwood, M Ellinghaus, *Cheshire and Fifoot Law of Contract*, 10<sup>th</sup> ed., Reed International Books Australia Pty Limited, trading as LexisNexis, 2012, pp 162-164.

*The reason for the manifold cases that support the alternative theories of option is to be found in the purpose the court is trying to achieve in any particular case. Each theory has its uses, depending on what is the issue before the court. For example, **the conditional contract theory is more easily reconciled with the fact that in option creates an equitable interest in land and with the view that an option may survive the death of the grantor.** On the other hand **the irrevocable offer approach creates fewer problems in giving force to the intention of the parties when the option is exercised by a nominee or other third party.** The view that has been expressed – **that the debate is an arid one and makes no difference in practice – overlooks the fact that the two theories are useful, and, further, that each may be essential in some special cases. Thus theoretical purity must give way to pragmatism.***

(footnotes omitted and emphasis added)

### **Goods and Services Tax Determination GSTD 2014/2**

46. *Goods and Services Tax Determination GSTD 2014/2*, titled “Goods and services tax: where real property is acquired following the exercise of a call option, does the call option fee form part of the consideration for the acquisition for the purposes of subsection 75-10(2) of the *A New Tax System (Goods and Services Tax) Act 1999*?”, was issued by the Commissioner on 5 February 2014 (**GSTD 2014/2**). Paragraph 11 of GSTD 2014/2 states that the determination applies “both before and after its date of issue”.<sup>10</sup>
47. In answer to the question posed by its title (as set out immediately above), GSTD 2014/2 states:

#### ***Ruling***

1. *No, the call option fee does not form part of the consideration for the acquisition for the purposes of subsection 75-10(2) of the A New Tax System (goods and Services Tax) Act 1999 (GST Act).*

48. “Appendix 1 – Explanation” to GSTD 2014/2 does not form part of the binding public ruling but is provided to help understand how the Commissioner’s view (as set out in paragraph 1 of GSTD 2014/2) has been reached. Relevantly, GSTD 2014/2 provides:

#### ***Consideration for the acquisition***

15. *Where a call option is granted, the grantee provides consideration to the grantor, commonly referred to as a call option fee.*

---

<sup>10</sup> Although the Option Deed was entered into on 7 December 2005, some years before GSTD 2014/2 was issued by the Commissioner (on 5 February 2014), nothing turns on this since paragraph 11 of GSTD 2014/2 states that the determination applies “both before and after the date of issue”.

16. *Where an entity has exercised a call option to compel the transfer of real property for GST purposes, the call option fee does not form part of the consideration for the property.*
17. *This is the case even if the agreement between the parties specifies that the call option fee forms part of the price for the supply of the real property. The operation of section 9-17 varies what may be the outcome under contract law.*
18. *Subsection 9-17(1) relevantly provides, that if an option to acquire a thing is granted, then the consideration for the supply of the thing on the exercise of the option is limited to any additional consideration provided either for the supply or in connection with the exercise of the option.*
19. *In discussing former subsection 9-15(3), the Explanatory Memorandum to the A New Tax System (goods and Services Tax) Bill 1998 stated:  
  
The supply of a right or option will be taxed when it is supplied. The later exercise of the right or option will be another supply. That later supply will not be taxable unless there is further consideration when the right or option is exercised.*
20. *Section 195-1 provides that consideration for a supply or acquisition means any consideration within the meaning given by sections 9-15 and 9-17, in connection with the supply or acquisition. Subsection 9-17(1) prescribes what is consideration in option situations, and section 195-1 incorporates these rules into the meaning of consideration for a supply or acquisition. Accordingly, **subsection 9-17(1) is relevant to determining what is consideration for an acquisition under subsection 75-10(2). The Note to the definition of 'consideration' in section 195-1 does not refer to subsection 75-10(2) as a provision that affects the meaning of the definition.***
21. ***In the context of a call option over real property, subsection 9-17(1) recognises that the supply of the option is a separate supply to the supply of the underlying property. As a consequence of subsection 9-17(1), the consideration for the call option is the call option fee, and the consideration for the supply or acquisition of the underlying property is limited to any additional consideration provided.***
22. *The interaction of subsections 9-17(1) and 75-10(2) of the GST Act results in the consideration for the acquisition of the interest, unit or lease being limited to the additional consideration provided on exercise of the call option. Therefore, the entity does not include the call option fee as part of the consideration for the acquisition in calculating the margin under subsection 75-10(2).*

(footnotes omitted and emphasis added)

49. A public ruling is a published expression of the Commissioner's opinion on the way in which a particular provision applies, or would apply, to entities generally or a class of entities: s 358-1 and 358-5 of the TAA. Public rulings, like GSTD 2014/2, bind the Commissioner if the public ruling applies to an entity and that entity relies on the ruling by

acting (or omitting to act) in accordance with the ruling: s 357-60 of the TAA and *Taxation Ruling* TR 2006/10.

50. However, public rulings, like GSTD 2014/2, are not binding on courts and tribunals as they do not have force of law: see *BHP Billiton Direct Reduced Iron Pty Ltd v Deputy Commissioner of Taxation* [2007] FCA 1528 per French J at [98] to [104].

#### **Whitby's submissions**

51. Whitby's submissions concerning whether the option fee ought to be included as consideration for the acquisition of Lot 22 are set out in the "Applicant's Outline of Submissions", dated 6 February 2017, as follows:

27. *The Applicant submits that the Option Fee ought to be included as consideration for the acquisition of the Property by the Applicant. Consideration for the Option Fee was provided to obtain an interest in the Property. It is immaterial that the granting of the option and the exercise of the option may be two separate supplies, if two or more supplies have occurred, each supply must be examined for the purposes of section 75-10(2).*
28. *The Tribunal ought to find that the words of section 75-10(2) of the GST Act permit the inclusion of the Option Fee as consideration paid by the Applicant to acquire its interest in the Property.*
- 1. The words of Section 75-10(2) of the GST Act permit the inclusion of the Option Fee**
29. *The phrase "consideration for your acquisition of the interest" includes an option fee paid prior to the acquisition of real property in circumstances where the parties have agreed that the option is to form part of the purchase price.*
30. *The phrase "consideration for your acquisition of the interest" is not defined in the GST Act. The phrase takes its ordinary meaning.*
31. *The High Court in Commissioner of Taxation v Qantas Airways Limited [2012] HCA 41 and Commissioner of Taxation v Reliance Carpet Co Pty Limited [2012] HCA 22 focused on the core provisions of the GST Act to identify a supply, identify a payment and identify a connection between the supply and payment.*
32. *The High Court has made it clear the GST Act is not to be approached by extracting the "essence" and "sole purpose" of a transaction in order to determine the GST treatment of the transaction (Commissioner of Taxation v Qantas Airways Limited [2012] HCA 41 at [27]). In the Applicant's submission this finding applies only to enquiries as to whether a supply occurred at all.*
33. *The Deed of Option sets out what was supplied by the grantor to the Applicant. The Tribunal must examine the Deed of Option to determine*

- what the Option Fee was consideration "for". **If the Tribunal finds that the Option Fee was not consideration paid to acquire an interest in the Property by the Applicant then this application for review must fail.** The Deed of Option, the relevant transfer of land form and equitable principles all support the Applicant's submissions that the Option Fee was consideration for an interest in the Property.*
34. *The terms of the Deed of Option inform that the Option Fee was paid as partial consideration for the Property. It was an express term of the Deed of Option that the purchase price was \$28,000,000.*
  35. *The Deed of Option operated so that irrespective of when the option was exercised, the Applicant was required to pay \$28,000,000 to acquire the Property; the Applicant could not have acquired the Property for any less than \$28,000,000.*
  36. *The Applicant was not required to make any payment towards the Option Fee until nearly 7 months after the Deed of Option was entered into, being on 1 July 2006. The Applicant was entitled to exercise the Option prior to 1 July 2006, if it had done so it would have been required to pay \$28,000,000 to acquire the Property from the grantor.*
  37. *Upon transfer of legal title of the Property it was noted that the consideration for the transfer was \$28,000,000. Duty was paid on consideration of \$28,000,000. The transfer of land form is further evidence of the inclusion of the Option Fee within the purchase price of the Property.*
  38. *Regardless of the legal effect of the Deed of Option, it is well established that a binding option to purchase a property creates an equitable interest in the property that is the subject of the option, to the benefit of the grantee (Commissioner of Taxes (Queensland) v Camphin [1937] HCA 30). At the time the Applicant entered into the Deed of Option it obtained an equitable interest in the Land and any consideration paid to obtain that interest must be included for the purposes of section 75-10(2) of the GST Act.*
  39. *The Tribunal should find that the Option Fee formed part of the consideration paid by the Applicant to acquire the Property.*
  2. **Section 9-17(1) does not detract from the submitted operation of section 75-10(2)**
  40. *Section 9-17(1) of the GST Act does not preclude an option fee forming part of consideration paid for the acquisition of the Property. **Section 9-17 of the GST Act operates to accelerate the collection of the GST that is payable by the grantor of the grant of an option. Further, section 9-17(1) of the GST Act ensures GST is not levied twice on the consideration paid for the grant of an option. The purpose of the section is not exclude option fees from the operation of section 75-10(2) of the GST Act.***
  41. *Section 9-17(1) cannot restrict the operation of section 75-10(2). If the Tribunal finds that there is an inconsistency between section 9-17(1) and 75-10(2) of the GST Act, section 75-10(2) must prevail (GST Act, s 45-5).*

(emphasis added)

52. Further, in the "Applicant's Outline of Submissions in Reply", dated 8 March 2017, Whitby submits the following:

**Correctness of GSTD 2014/2**

4. The Tribunal is not bound to follow GSTD 2014/2 as the ruling is based on an erroneous interpretation of the GST Act.
4. *Section 75-10(2) of the GST Act states:*
  - (2) *Subject to subsection (3) and section 75-11, the margin for the supply is the amount by which the Consideration for the supply exceeds the consideration for your acquisition of the interest, unit or lease in question.*
5. *It is with these words that the Tribunal must start its enquiry. The Tribunal must interpret the words of the section according to their plain meaning. The Applicant submits that the phrase consideration for your acquisition of the interest, unit or lease in question plainly includes those amounts which are agreed to be consideration for the acquisition of land.*
6. *Section 9-17(1) of the GST Act cannot limit the operation of section 75-10(2) of the GST Act by reason of section 45-5 of the GST Act. GSTD 2014/2 makes no reference to section 45-5 of the GST Act.*
7. *Paragraph 22 of GSTD 2014/2 states the following:*
  - The interaction of subsections 9-17(1) and 75-10(2) of the GST Act results in the consideration for the acquisition of the interest unit or lease being limited to the additional consideration provided on exercise of the call option. Therefore, the entity does not include the call option fee as part of the consideration for the acquisition in calculating the margin under subsection 75-10(2).*
8. *It is this reasoning which brings GSTR 2014/2 into error. If, as submitted above, section 75-10(2) of the GST Act includes any amounts paid for the supply of the land in question section 9-17(1) of the GST Act cannot limit the operation of section 75-10(2) of the GST Act.*
9. *The Explanatory Memorandum to the former section 9-15(3) provides no support for the Respondent's case. The Explanatory Memorandum does no more than explain that 9-15(3) accelerates the taxation of the supply of an option in the hands of the grantor and ensures the supply of an option is not subject to double taxation. The Explanatory Memorandum does not support the proposition that an option fee cannot form part of or be consideration for the acquisition of land for the purposes of section 75-10(2) of the GST Act.*
10. *The Tribunal must consider the words of the legislation alone and by extension ought to find that GSTD 2014/2 is incorrect for the reasons stated above. An option fee can be consideration for the acquisition of land for the purposes of section 75-10(2) of the GST Act.*

11. *Once it is accepted that an option fee may be consideration for the acquisition of land it is plain on the terms of the Deed of Option that consideration of \$28,000,000 was paid by the Applicant for the acquisition of the Property.*

### **Tribunal's view**

53. The Tribunal, with respect, disagrees, for the most part, with Whitby's contentions, as set out above in paragraphs 51 and 52.
54. Whilst the Tribunal is cognisant of the fact that it is not bound to follow GSTD 2014/2 (refer to paragraph 50 above), it nevertheless agrees with the construction adopted by the Commissioner in GSTD 2014/2, being that the supply of an option is a separate supply to the supply of the underlying asset (here, the real property/land): see GSTD 2014/2 at [21]. That is, in this case there are two separate "supplies" (as defined in s 9-5 of the GST Act) for GST purposes. Whether the two separate "supplies" constitute "taxable supplies" (as defined in s 9-10 of the GST Act) depends on whether all of the requirements in s 9-5 of the GST Act are met, including that the supply is made for "consideration", as defined.
55. "Consideration" for the supply of the "option" is the option fee (here, \$2,000,000), whilst "consideration" for the supply of the underlying asset (here, Lot 22; the real property/land) is the additional consideration provided for the underlying asset (here, \$26,000,000).
56. The Tribunal considers that GSTD 2014/2, although not binding on the Tribunal, is well-founded both in terms of the GST Act (refer to paragraphs 25 to 37 above) and the common law on options (refer to paragraphs 38 to 45 above).
57. As previously stated, s 75-10(2) of the GST Act provides:  
*...the margin for the supply is the amount by which the \*consideration for the supply exceeds the **consideration for your acquisition of the interest, unit or lease in question.***
58. The word "interest" in s 75-10(2) refers to a "freehold interest in land" in s 75-5(1)(a) and not the broader definition of "real property" in the "Dictionary" in s 195-1 of the GST Act: refer to paragraph 34 above. Relevantly, as contended by counsel for the Commissioner, s 75-10(2) of the GST Act refers to a "freehold interest in land", being the underlying

asset, but does not extend to an option to purchase the underlying asset, the subject of the option.

59. As submitted by counsel for the Commissioner, a plain reading of s 9-17 of the GST Act makes it clear that when there is an option fee paid, the consideration for the supply of a “freehold interest in land” is limited to the consideration paid in addition to any option fee. That is, there are two taxable supplies for GST purposes, being the supply of the rights to which the option fee refers (here, the bundle of rights acquired by Whitby under the Option Deed, including, for example, the right to access Lot 22 for the purpose of undertaking survey works, geotechnical tests and other works to obtain subdivision approval: refer to paragraph 20 above) and the supply of the “freehold interest in land” (here, Lot 22; the real property/land) upon exercise of the option.
60. Also as submitted by counsel for the Commissioner, it is noteworthy that s 75-10 of the GST Act is excluded from the provisions which are “affected” by the definition of “consideration” in the “Dictionary” in s 195-1 of the GST Act in accordance with the “Note” to the definition of “consideration” in s 195-1, which “Note, by virtue of s 182-1(1) of the GST Act, forms part of the legislation.
61. This construction, that the option fee is not consideration for the ultimate land purchase, but for the bundle of rights embodied in the option itself, is also supported by both common law theories on option contracts, namely the “irrevocable offer” theory and the, alternative, “conditional contract” theory: refer to paragraphs 42 to 45 above.
62. That is, under the “irrevocable offer” theory the option fee is consideration for a contract other than the contract to purchase the land, being consideration for the purchase of the right to have an offer to purchase open for the stipulated time. It must, as submitted by counsel for the Commissioner, be in this context that the grant of an option does not of itself involve any transfer of ownership in the real property (freehold) in question: *Camphin* at 133-134.
63. Whereas, under the “conditional contract” theory, the option is the right to complete the contract on fulfilment of the conditions. As submitted by counsel for the Commissioner, it may be regarded as a negative right, because it, in effect, gives the grantee the right to

not complete the contract and the right to prevent the grantor from selling the real property concerned to another party.

64. Although not directly relevant to this case, it is worth noting how options are treated under the capital gains tax (CGT) provisions in the *Income Tax Assessment Act 1997 (ITAA 1997)*. Relevantly, “Note 1” to the definition of “CGT asset” in s 108-5 of the ITAA 1997 provides several examples of “CGT assets” to assist the reader of the legislation. An “option” is included by the draftsman as an example of a “CGT asset” to put beyond doubt that an “option”, by itself, constitutes a “CGT asset” the exercise of which can give rise to a “CGT event”. However, the “land”, the subject of such an option, is treated as a separate “CGT asset” for CGT purposes, the transfer of which will trigger a separate “CGT event” for CGT purposes.
65. Whilst it may be the case, as submitted by Whitby, that an option to purchase land (call option) confers on the grantee an equitable interest in the land, the subject of the option contract, for GST purposes there is no “supply” (transfer) of the land, the subject of an option contract, until there is a change in both the legal and beneficial ownership of the land itself. The “supply” (transfer) of the land, the subject of a call option contract, is a separate “supply”, under of s 9-10 of the GST Act, for GST purposes and a separate “CGT event” (disposal) of a “CGT asset” for CGT purposes. In this particular case, the Option Deed does not convey an interest in the land (Lot 22), rather it conveys a “bundle of rights” to Whitby from the Owner. Nowhere in the Option Deed is there an unconditional purchase of the land (Lot 22). Put differently, nothing in the Option Deed results in the transfer of the legal and beneficial ownership of Lot 22 from the Owner to Whitby.
66. In the “Respondent’s Submissions” at [31(a)-(i)], dated 24 February 2017, the Commissioner contends that it is clear, based on the following facts of this case, that the Option Fee should not be included in the acquisition cost of Lot 22 in applying the “margin scheme”:
- (a) *The fact that the transfer of land was stamped for the full amount of \$28,000,000 is of no moment: the applicant’s own solicitors prepared the transfer document and presumably did so on the basis of the contract for sale, and the consideration for duty purposes cannot displace the clear meaning of the GST Act;*

- (b) notably, the transfer is stamped pursuant to an instrument dated 15 November 2007, some 2 years after the date of the option contract: Ex 1;
- (c) the terms of the option itself clearly contemplate that, whilst ultimately the \$2,000,000 option fee is counted as part of the full purchase price, the option fee is not refundable if the sale does not proceed: cl 3(a), 3(b);
- (d) the obligation to pay the fee survived the death of the owner of the land: cl 4;
- (e) the fee itself is expressed to be “As consideration for the grant of the option”, being the chance to buy the land and the bundle of rights granted by the option contract, and not in consideration for the purchase of the land: cl 3(a);
- (f) the option expires automatically if one of the tranches of the option fee is not paid on time: cl 3(c);
- (g) the option contemplates that the sale of the land may not eventuate: “In the event of exercise of the option”: cl 6;
- (h) the bundle of rights granted under the option are substantial:
  - (i) involving inconvenience and disruption to the land owner’s usual rights of occupation and include an obligation to assist the option holder: cl 2(a);
  - (ii) the land owner has agreed to be restrained from selling the land to another party: “**The Owner hereby grants to the Option Holder the exclusive right to purchase the property...**”; and
  - (iii) there is a confidentiality agreement restraining the land owner from discussing the arrangement: cl 12,so that it is plain that the land owner has given up a substantial bundle of rights normally associated with her ownership, in exchange for the option fee; and
- (i) whilst it is true that the option fee could be avoided, either in part or whole, depending on when and whether the applicant chose to exercise the option: cl 3(c), that, read with cl 3(b), is a risk minimising strategy. As the intrusion onto the land increased and the likelihood of planning approval increased, the risk of not proceeding with the sale decreased, so that more of the non-refundable option fee was paid.

(emphasis added)

67. The Tribunal agrees with the above submissions of the Commissioner. In addition, the Tribunal notes that the fact that the Option Deed provides, in clause 3, that the \$2,000,000 option fee “forms part of the Purchase Price” and, in clause 3 of the Schedule, that the “Purchase Price” is “\$28,000,000 (Inclusive of the Option Fee)” is of no moment: refer to paragraph 20 above. That is, the fact that Whitby’s solicitors drafted the Option Deed in this way does not defeat what is occurring, in substance and for the purposes of the GST Act, in this case, namely that there are two separate and distinct “supplies” for two

separate and distinct amounts of “consideration”. Whitby cannot rely on the words in the Option Deed to effectively “contract out” of what, as a matter of fact and law, happened.

68. Whilst acknowledging that the EM is merely an extrinsic material, an aid to statutory interpretation, the Tribunal considers that its construction in this case (as set out above) is supported by paragraph 3.9 of the EM, despite Whitby’s submission to the contrary: refer to paragraph 37 above.
69. The GST has been described as a practical business tax, imposed with respect to elements of commerce: *Sterling Guardian Pty Ltd v Commissioner of Taxation* 2005 ATC 4796; (2005) 220 ALR 550 at 562-563 per Stone JXX. It falls on a wide variety of business transactions and is self-assessing. These considerations, and the nature, policy and surrounding legislative context of the GST Act, indicate that the GST Act should be construed in a practical and common sense way and interpretations which are unduly technical or overly meticulous and literal should generally be avoided: see *HP Mercantile Pty Ltd v Commissioner of Taxation* [2005] FCAFC 126; (2005) 143 FCR 553 at 564-566 per Hill J; *Saga Holdings Ltd v Federal Commissioner of Taxation* 2006 ATC 4841; DG Hill, *Some thoughts on the principles applicable to the interpretation of the GST* (2004) 6 Journal of Australian Taxation 1. The Tribunal’s construction in this case (as set out above) is consistent accords with the Court’s approach to interpreting the GST Act. That is, in this case, from a practical and business point of view there are two separate and distinct supplies for GST purposes, namely the supply of the option (i.e. a bundle of rights) and the subsequent supply of Lot 22 (i.e. the real property/land): *Reliance Carpet Company v Federal Commissioner of Taxation* (2007) 160 FCR 433 at 449.

### **Conclusion**

70. In conclusion, the Tribunal finds that upon the proper construction of the GST Act, based on common law principles and based on the facts of this case, the Option Deed is for a separate and distinct supply of a bundle of rights for which substantial consideration (i.e. \$2,000,000) was paid by Whitby to the Owner in tranches over an 18 month period.
71. The Tribunal also finds that the option fee (of \$2,000,000) should not form part of the acquisition cost of Lot 22 in applying the “margin scheme” rules in Division 75 of the GST

Act to the disposal by Whitby of the subdivided residential lots to third parties in the monthly tax periods 1 May 2011 to 31 December 2013..

## **PENALTIES**

72. It flows from the Tribunal's above "Conclusion", that no reduction in or remittal of penalty is applicable in respect of issue (ii), as set out in paragraph 7 above.
73. As stated under the heading "Issues", the Commissioner concedes that it is appropriate to recalculate the penalty applicable attributable to the misapplication of the margin scheme, arising from the agreement reached between the parties as regards the correct land area and cost base for calculation, being issue (v): refer to paragraphs 7 to 9 above. Aside from this, there is no basis on which the penalties imposed on Whitby in this case should be reduced or remitted.

## **DECISION**

74. For the above reasons, the Tribunal:
- (i) sets aside the Objection Decision, in part, and remits the matter to the Commissioner for reconsideration in accordance with the recommendation that the Commissioner issues Whitby with amended GST and penalty assessments pursuant to the agreement between the parties in relation to issue (v) as set out in paragraph 9 above; and
  - (ii) otherwise affirms the Objection Decision.

*I certify that the preceding 74 (seventy-four) paragraphs are a true copy of the reasons for the decision herein of Senior Member CR Walsh*

.....[Sgd].....

Administrative Assistant

Dated: 20 March 2017

Dates of hearing: **6-7 February 2017**

Date final submissions received: **8 March 2017**

Representative for the Applicant: **Mr M Sunits**  
**Zafra Legal**

Counsel for the Respondent: **Ms CH Thompson**

Solicitor for the Respondent: **Mr T Burrows**  
**The Australian Government Solicitor**