

MSAUS Pty Ltd v Commissioner of Taxation -

Decision impact statement

MSAUS Pty Ltd v. Commissioner of Taxation

Court citation(s):	2017 ATC 10-463 [2017] AATA 1408
Venue:	Administrative Appeals Tribunal
Venue reference no:	2012/1228; 2012/1265
AAT member name:	BJ McCabe DP
Judgment date:	31 August 2017
Appeals on foot:	No
Decision outcome:	Unfavourable to the Commissioner

Impacted advice



This decision has no impact on any related advice or guidance.

Précis

Outlines the ATO's response to this case which decides that certain purchasers of residential premises in a property development did not have increasing adjustments for GST purposes, despite the Full Federal Court holding otherwise in an earlier case.

Brief summary of facts

MSAUS bought residential premises subject to an existing lease, agreeing the supply was GST-free as a going concern. If the lease was input taxed however, special conditions in the contract sought to apply the margin scheme. The Full Federal Court and the High Court had previously considered the GST consequences surrounding the sale of other leased residential premises in the same development. In *South Steyne*¹, the Full Federal Court held that identical conditions were ineffective to apply the margin scheme. The AAT had also reached a similar conclusion in the *Hotel Apartment Purchaser* case.² In *MBI Properties*, the High Court found that a different purchaser in the same circumstances made an input taxed supply and was subject to an increasing adjustment.³ Unlike the other decided cases, MSAUS and the vendor later entered into 'deeds of rectification' to remove retrospectively the going concern clause from their sale contract.

¹ *South Steyne Hotel Pty Ltd v. Federal Commissioner of Taxation* [2009] FCAFC 155 (at [3, 50]).

² *Hotel Apartment Purchaser v. Commissioner of Taxation* [2013] AATA 567.

³ *Federal Commissioner of Taxation v. MBI Properties Pty Ltd* [2014] HCA 49 (at [46]).

Issues decided by the Tribunal

The AAT decided it wasn't bound by *South Steyne*. It held that the special conditions were effective to apply the margin scheme, and that there was no increasing adjustment. Incidental comments were made about the 'deeds of rectification'.

Rectification by order – McCabe DP commented on a 2016 deed seeking to rectify the sale contract made 10 years earlier. He said it 'would have been preferable' had MSAUS sought orders from the Supreme Court. Orders of this kind would rectify the sale contract retrospectively, 'bind third parties', and avoid the 'current uncertainty'.⁴ However, McCabe DP accepted there was no certainty a court would have ordered rectification in the circumstances of the MSAUS case, 'especially if the Commissioner opposed that outcome'.⁵

Rectification by deed – McCabe DP said that, even if the contract could be rectified by deed, it was an 'interesting question' as to how margin scheme requirements could be met in any case.⁶

ATO view of decision

Despite the tension between this decision upholding the effectiveness of the margin scheme conditions unmodified by the rectification deeds, and the decisions finding identical conditions ineffective in *South Steyne* and *Hotel Apartment Purchaser*⁷, the broader public interest is not served by an appeal. Clarification of how the special conditions in the MSAUS contract operated is unlikely to assist the community, given the consideration already given to them in other decided cases. Additionally, the High Court's decision in *MBI Properties*, that purchasers of leased residential premises make supplies by way of lease and can be subject to increasing adjustments, remains binding authority of general application notwithstanding this decision.

Further, as the Commissioner understands it, 'rectification by deed' for the purpose of changing how the tax law has applied to an earlier transaction is not established as a general principle.⁸ Accordingly, the Commissioner is not bound to accept at face value a deed of this kind executed by private parties. In the absence of court orders, the public interest does not compel the Commissioner unilaterally agreeing to change how the tax law has already applied to an earlier transaction.

⁴ *MSAUS Pty Ltd v. Commissioner of Taxation* [2017] AATA 1408 (at [41]).

⁵ *Baird v. BCE Holdings Pty Ltd* (1996) 40 NSWLR 374 (at 384), *CSD v. Carlenka Pty Ltd* (1995) 41 NSWLR 329 (at 345), cited.

⁶ *MSAUS Pty Ltd v. Commissioner of Taxation* [2017] AATA 1408 (at [44]), *Davis v. Federal Commissioner of Taxation* [2000] FCA 44 (at [57]), quoted.

⁷ *Hotel Apartment Purchaser v. Commissioner of Taxation* [2013] AATA 567.

⁸ cf *Baxter v. Federal Commissioner of Taxation* [2002] FCA 1256 (at [25-26]), *Chief Commissioner of State Revenue v. Smeaton Grange Holdings Pty Ltd* [2017] NSWCA 184 (at [10, 148-149]).

Legislative references

ANTS(GST)A 1999

38-325

75-5

135-5

Case references

Federal Commissioner of Taxation v. MBI Properties Pty Ltd (2014) 254 CLR 376; [2014] HCA 49; 92 ATR 241; 2014 ATC 20-474

South Steyne Hotel Pty Ltd v. Federal Commissioner of Taxation (2009) 180 FCR 409; [2009] FCA 13; 2009 ATC 20-145; 74 ATR 41

Baxter v. Federal Commissioner of Taxation [2002] FCA 1256

Davis v. Federal Commissioner of Taxation [2000] FCA 44

Re Hotel Apartment Purchaser and Federal Commissioner of Taxation 2013 ATC 1-055; [2013] AATA 567

Chief Commissioner of State Revenue v. Smeaton Grange Holdings Pty Ltd [2017] NSWCA 184

Baird v. BCE Holdings Pty Ltd (1996) 40 NSWLR 374

CSD v. Carlenka Pty Ltd (1995) 41 NSWLR 329

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