

Decision Impact Statement

Case Name *Aquatic Air Pty Limited v Siewert & Anor*

Court Citation (s): [2015] NSWSC 928
Venue: Supreme Court of NSW
Venue Reference No: 2012/169096
Judges Name(s): Brereton J
Judgment date: 27 July 2015
Appeals on foot: No, appeal dismissed – See *Aquatic Air Pty Ltd v Siewert* [2016] NSWCA 318
Decision outcome: N/A


Impacted Public Rulings, Determinations and Law Administration Practice Statements

Impacted Rulings/Determinations:

Goods and Services Tax Ruling GSTR 2006/9 *Goods and services tax: supplies*
ATO Interpretative Decision ATO ID 2005/185 *GST and supply of air ambulance*

Impacted Law Administration Practice Statements:

N/A

 The ATO is reviewing the impact of this decision including precedential documents and Law Administration Practice Statements

Précis

Outlines the ATO's response to this case which concerns whether supplies of air ambulance services were GST-free pursuant to subsection 38-10(5) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

Brief Summary of Facts:

The defendants, Dieter and Lieselotte Siewert (the Siewerts), were the owners of a number of aviation companies (the Aviation Companies), including Wingaway Air Pty Ltd (Wingaway), through which Mr Siewert conducted various aviation operations, including the provision of air ambulance services to regional hospitals and area health services.

Wingaway had a fleet of aircraft specifically fitted for medical care. The company was engaged by hospitals to transport patients who were under the hospital's care (usually from home to hospital, or between hospitals). Upon doing so, Wingaway would invoice the relevant health service for the services that had been performed which would be paid by the health service.

When the Siewerts purchased Wingaway, they were informed by their vendor that the provision of ambulance services to hospitals was GST-exempt; reliance was

placed on an ATO private ruling issued on 25 October 2000 to Wingaway National Pty Ltd, a separate entity that was related to the previous owner of Wingaway Air Pty Ltd. The Siewerts continued to operate the business on the assumption that the supplies made by Wingaway were GST-free.

On 23 July 2012, the Commissioner issued notices of amended assessment to Wingaway for over \$2.9m for unpaid GST, penalties and interest in respect of the period 1 July 2008 to 31 May 2012. The assessments were founded on the footing that the supplies made by Wingaway did not fall within the scope of subsection 38-10(5) of the GST Act, and thus were not GST-free.

On 28 May 2012, AT Air Group Pty Ltd commenced proceedings against the Siewerts seeking, *inter alia*, damages for misrepresentation in respect of the share sale agreement. Aquatic alleged, amongst other things, that the Siewerts had misrepresented the true GST liability of Wingaway when the agreement between the parties was entered.

Issues Decided by the Court

The issue for determination by the Court was whether the Siewerts had made a misrepresentation in respect of Wingaway's true GST liability as at 30 June 2011. Brereton J decided that no representation or misrepresentation had been made by the Siewerts in this regard. His Honour went on to observe that, contrary to the Notices of Amended Assessment issued by the Commissioner, Wingaway did not have a GST liability for the relevant period because its activities fell within the ambit of subsection 38-10(5) of the GST Act.

His Honour noted that the Commissioner's Assessments were predicated on two primary bases:

- (a) that Wingaway did not hold an Air Operator's Certificate (AOC) and therefore could not have been providing air ambulance services; and
- (b) that the services rendered by Wingaway were provided to the hospitals, not to the individuals being transported, and thus, was not provided in the course of the treatment of the recipient of the supply.

His Honour disagreed with the Commissioner's reasoning and observed that:

- (a) there is no requirement in the GST legislation for an air ambulance service to hold an AOC; and
- (b) the recipients of the services rendered by Wingaway were the patients transported by Wingaway and not the hospitals that arranged the service. The services rendered were therefore provided in course of the treatment of the recipient of the supply in accordance with subsection 38-10(5) of the GST Act.

Accordingly, his Honour concluded that the supplies rendered by Wingaway fell within the ambit of subsection 38-10(5) of the GST Act and were GST-free.

On appeal, the Court of Appeal did not proffer any view as to the correctness of Brereton J's observations as to Wingaway's liability for GST.

ATO View of Decision

The observations made by Brereton J as to Wingaway's liability for GST were *obiter dicta*. This is because his Honour had previously held that the relevant 'representation' had not been made by the Siewerts. It was therefore unnecessary for his Honour to consider whether, if the representation had been made, it was correct.

Accordingly, the Commissioner does not consider that he is bound to administer the GST Act in a manner consistent with the observations of Brereton J in respect of subsection 38-10(5) of the GST Act.

The Commissioner respectfully disagrees with his Honour's identification of the recipients of the supplies made by Wingaway. The Commissioner's view in respect of tripartite arrangements is set out in Goods and Services Tax Ruling GSTR 2006/9 *Goods and services tax: supplies*. Consistent with GSTR 2006/9, the Commissioner considers that the recipients of the supplies made by Wingaway were the hospitals with which Wingaway contracted. The Commissioner will continue to apply the law in the manner set out in GSTR 2006/9.

The Commissioner accepts Brereton J's finding that holding an AOC is not a precondition to satisfying subsection 38-10(5) of the GST Act.

Administrative Treatment

Implications for impacted ATO precedential documents (Public Rulings and Determinations)

ATO Interpretative Decision ATO ID 2005/185 was withdrawn on 8 December 2017.

Implications for impacted Law Administration Practice Statements

The decision has no impact on Law Administration Practice Statements.

Amendment history

Date of amendment	Part	Comment
17 Feb 2020	Administrative treatment	Updated to reflect the withdrawal of ATO ID 2005/185.

Legislative References:

A New Tax System (Goods and Services Tax) Act 1999, s38-10

Case References:

Aquatic Air Pty Limited v Siewert & Anor [2015] NSWSC 928

Aquatic Air Pty Ltd v Siewert [2016] NSWCA 318

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