Decision impact statement

Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation

Court citations:	[2024] FCAFC 42 [2023] FCA 257
Venue:	Federal Court of Australia
Venue reference no:	VID 253 of 2023 (Full Federal Court) VID 492 of 2021 (Federal Court)
Judge names:	Perram, Abraham & Button JJ (Full Federal Court) Hespe J (Federal Court)
Judgment dates:	20 March 2024 (Full Federal Court) 24 March 2023 (Federal Court)
Appeals on foot:	No
Decision outcome:	Fully favourable to the Commissioner as to outcome; partly favourable as to grounds

Impacted advice

- Goods and Services Tax Ruling GSTR 2006/9 *Goods and services tax: supplies*

Summary

This Decision impact statement outlines the ATO's response to this case on whether creditable acquisitions were made in carrying on any enterprise and, if so, whether input tax credits can be claimed.

All legislative references in this Decision impact statement are to the *A New Tax System (Goods and Services Tax) Act 1999*, unless otherwise indicated.

Brief summary of facts

This case considered the availability of input tax credits on invoices paid by Konebada Pty Ltd as trustee for the William Lewski Family Trust (Konebada) on legal services provided to members of the Lewski family and related entities (Lewski Family Group) as beneficiaries of the trust.

Konebada had entered into litigation funding agreements with lawyers providing the legal services to pay litigation costs incurred and, in return, to receive any litigation proceeds. Konebada paid the invoices issued by the lawyers.

Amended assessments were issued to Konebada denying input tax credits on the basis that Konebada was a third-party payer and did not make any creditable acquisitions (acquisition issue). Those assessments were made on the basis that no acquisition of legal services, or anything else, was made by Konebada from the

lawyers. In the alternative, Konebada made no acquisitions in this regard in carrying on any relevant enterprise (enterprise issue).

Issues decided

At first instance in the Federal Court, Hespe J ruled against Konebada on the enterprise issue and for Konebada on the acquisition issue. Konebada appealed to the Full Federal Court on the enterprise issue and the Commissioner filed a notice of contention on the acquisition issue.[1] The notice contended that Konebada made no relevant acquisitions or, failing that, that Konebada provided no consideration 'for' those acquisitions.

The Full Federal Court dismissed the appeal on the enterprise issue and declined to consider the notice of contention. Accordingly, Konebada was not entitled to input tax credits, as the acquisitions from the lawyers were not made in the course or furtherance of any relevant enterprise carried on by Konebada.[2]

Creditable acquisition

At first instance in the Federal Court, Hespe J found that Konebada acquired '… a right to require the legal advisor to provide legal services to the Beneficiaries' and '… a service – the provision of legal advice or services to the Beneficiaries'.[3] Hespe J held that Konebada was more than simply a third-party payer of legal services provided to the Lewski Family Group[4] and that Konebada had made an 'acquisition' under section 11-10.

As the acquisition issue was decided favourably to Konebada by Hespe J, it was not a ground of appeal raised by Konebada before the Full Federal Court.

Enterprise

It was an agreed fact that Konebada was carrying on *an* enterprise.[5] At first instance, Hespe J held, however, that the scope of the enterprise carried on by Konebada did not include managing litigation, tax, legal and regulatory compliance, and commercial matters for the Lewski Family Group.[6] The acquisitions of legal services by Konebada were not made in the course or furtherance of any enterprise carried on by that entity.[7]

The Full Federal Court dismissed the appeal by Konebada on the enterprise issue. It followed that Konebada made no creditable acquisitions of legal services from the lawyers and was not entitled to input tax credits for those acquisitions.

As the Full Federal Court declined to consider the notice of contention filed by the Commissioner on the acquisition issue, the findings of Hespe J at first instance on that issue stand.

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[1] *Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation* [2024] FCAFC 42 at [38].
[2] *Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation* [2023] FCA 257 (*Konebada – first instance*) at [132].
[3] *Konebada – first instance* at [112].
[4] Compare *Professional Admin Service Centres Pty Ltd v Commissioner of Taxatio*n [2013] FCA 1123.
[5] Involving provision of management-related services to members of the Lewski Family Group – *Konebada – first instance* at [116].
[6] *Konebada – first instance* at [125].
[7] *Konebada – first instance* at [123].

ATO view of decision

Creditable acquisition

Input tax credits are not claimable on the facts of this case and in materially similar situations. Whether or not the payment of invoices issued by lawyers in litigation funding situations gives rise to any acquisition for GST purposes will depend on the facts and evidence of the particular case.

We do not consider as a general proposition that a 'litigation funder' necessarily makes an acquisition when it pays invoices issued by lawyers. Nor do we consider that, where acquisitions are made, they necessarily give rise to creditable acquisitions. Nexus and enterprise requirements must also be satisfied for input tax credits to be lawfully claimed.

Further, we do not consider that the present case broadens the principles established in the *Department of Transport* litigation relevant to tripartite arrangements.[8] In particular, we do not consider that any 'pre-existing framework'[9] in the *Department of Transport* sense will necessarily exist in litigation funding situations, or in other contexts where one entity merely pays for acquisitions made by another entity.

Given the Full Federal Court in the present case declined to consider the notice of contention, we will seek to clarify, by way of further judicial guidance, the scope and application of the *Department of Transport* principles to litigation funding arrangements and tripartite arrangements when a suitable case presents itself.

Consideration

In the notice of contention, the Commissioner argued that any supplies to Konebada made by the lawyers were not made 'for' consideration, as required by paragraph 11-5(c).[10] Our view was that payments made by Konebada to the lawyers were consideration solely for the supply of legal services by the lawyers to members of the Lewski Family Group.

Enterprise

The decision regarding 'enterprise' in the present case[11] is consistent with our view in Miscellaneous Taxation Ruling MT 2006/1 *The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number*.[12]

Implications for impacted advice or guidance

The ATO is reviewing the impact of this decision on GSTR 2006/9.

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[8] *Secretary to the Department of Transport (Victoria) v Commissioner of Taxation* [2009] FCA 1209; *Commissioner of Taxation v Secretary to the Department of Transport (Victoria)* [2010] FCAFC 84. See also, *Konebada – first instance* at [108–111] and paragraphs 221A to 221G of GSTR 2006/9.

[9] *Konebada – first instance* at [105]; compare *Professional Admin Service Centres Pty Ltd v Commissioner of Taxatio*n [2013] FCA 1123 at [48].

[10] Hespe J did not specifically consider whether payments by Konebada were consideration 'for' the acquisitions in question. As the Full Federal Court declined to consider the notice of contention, there is no express judicial finding on whether nexus requirements were in fact satisfied.

[11] The principles in *Konebada – first instance* were confirmed by the Full Federal Court in *Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation* [2024] FCAFC 42 at [72-77].

[12] See paragraphs 170 to 179 of MT 2006/1.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued: 21 August 2024

Due date: 20 September 2024

Contact officer details have been removed as the comments period has ended.

Legislative references

ANTS(GST)A 1999 11-5(c)
ANTS(GST)A 1999 11-10

Case references

Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation [2023] FCA 257; 2023 ATC 20-857; 115 ATR 542
Konebada Pty Ltd ATF the William Lewski Family Trust v Commissioner of Taxation [2024] FCAFC 42; 302 FCR 1; 2024 ATC 20-899
Professional Admin Service Centres Pty Ltd v Commissioner of Taxation [2013] FCA 1123; 2013 ATC 20-424; 94 ATR 445
Secretary to the Department of Transport (Victoria) v Commissioner of Taxation [2009] FCA 1209; 2009 ATC 20-140; 73 ATR 690; [2010] ALMD 6765; 261 ALR 39
Commissioner of Taxation v Secretary to the Department of Transport (Victoria) [2010] FCAFC 84; 188 FCR 167; 2010 ATC 20-196; 76 ATR 306; [2010] ALMD 7496

Relevant rulings

GSTR 2006/9; MT 2006/1

ATO references

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