HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 01 Feb 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S170/2023
File Title:	Automotive Invest Pty Limited v. Commissioner of Taxation
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	01 Feb 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

AUTOMOTIVE INVEST PTY LIMITED
Appellant

and

COMMISSIONER OF TAXATION
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of the issues

2. The issues that arise on the Appellant's appeal are whether a "change of use" for the purposes of paras 15-30(3)(c) and 15-35(3)(c) of the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) ("LCTA") in respect of a luxury car can occur:

    a. where the car, at all times, remains trading stock of the person who effectively quoted for the acquisition of the vehicle; or

    b. alternatively, where the use of the vehicle is merely incidental or subservient to, and/or not inconsistent with, its continuing use as trading stock; and, if so

    c. whether the display by the Appellant of its stock in its showroom was such an incidental or subservient and/or consistent use.

3. Unless otherwise specified, all legislative references are to the LCTA.

Part III: Section 78B notices

4. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citation of the decisions below

5. The decision of the primary judge, Thawley J, is reported as *Automotive Invest Pty Ltd v FCT* (2022) 114 ATR 569 ("PJ").

6. The decision of the Full Court of the Federal Court, Wheelahan and Hespe JJ, Logan J dissenting, is reported as *Automotive Invest Pty Ltd v FCT* [2023] FCAFC 129 ("FFC").

Part V: Facts

The Appellant's business

7. At all material times, the Appellant carried on the business of buying and selling prestige, rare and classic motor vehicles and was a licensed motor vehicle dealer in New South Wales under the *Motor Dealers and Repairers Act 2013* (NSW) ("MDR Act") (Core Appeal Book ("CAB") 65; FFC [65]).

8. Between 2015 and 2019 the Appellant bought and sold over 800 vehicles, being its trading stock held for sale or exchange in the ordinary course of its business (CAB 65; FFC [67]; Appellant's Book of Further Material ("AFM") 5-14). Stock on hand ranged from more attainable classic cars, like Holdens and Fords, through to rare and exotic cars, like Lamborghinis and Ferraris.

9. From 28 May 2016 ("commencement date"), the Appellant's business premises were a former Bunnings warehouse in Gosford which was converted into a car showroom (CAB 60; FFC [48]; CAB 63; FFC [59]). Under the MDR Act, the Appellant was, inter alia, required to display motor vehicles for sale at the place specified in the licence (i.e., the showroom) (sub-s 48(1) of the MDR Act) (CAB 65; FFC [65]).

10. In order to undertake the warehouse conversion, a consultant was retained so that construction work could be performed, and local council approvals obtained, to adapt the warehouse to a "Vehicle Sales, Hire, Display and Prestige Car Storage Premises" (CAB 63; FFC [59]).

11. The showroom was in an industrial area of Gosford and was zoned "IN1 General Industrial" under the Gosford Local Environmental Plan 2014 ("LEP") (CAB 63-4; FFC [60]). Planning laws permitted (with consent) the land to be used for "Vehicle sales" (LEP, s 2.1 and Land Use Table, Note 3), which is defined in the Dictionary to the LEP to mean "a building or place used for the display, sale or hire of motor vehicles …" (CAB 63-4; FFC [60]). Note 4 in the Land Use Table for land zoned IN1 General Industrial expressly prohibited the use of land for "Information and education facilities" which is

defined in the Dictionary to the LEP to mean, among other things, "the exhibition or display of items, … [in a] museum" (CAB 63-4; FFC [60]).

12. The Appellant leased the showroom from a related entity. The lease agreement described the permitted use as a "[m]otor vehicle dealership".

13. From the commencement date, cars were displayed at the premises. This was the location where the Appellant's trading stock was ordinarily "on hand". The Appellant treated each of the cars on display as trading stock in its income tax returns and accounting records (CAB 65; FFC [68]; AFM 15-34)). The Appellant also maintained trading stock software (typically used by car dealers) called "EasyCars" to record the purchase and sale of vehicles, and to manage invoices and stock levels, as well as software called "Autogate" for tracking sales leads.

14. Cars were also advertised by the Appellant for sale online. Each car, including the 40 cars the subject of this appeal (the "Assessed Cars") was assigned a stock number (CAB 65; FFC [68]). In addition to the computer software, the Appellant kept books and records which contained the potential sale price for each car (CAB 65; FFC [68]). The sales team kept "sold stock" reports for car sales and maintained a record of sales leads and sales enquiries. Records of price lists were maintained.

15. The Appellant's business was directed to maximising profit on the sale of cars. In its first full financial year of operation, its revenue from car sales was approximately $28,429,359, which, less cost of sales of $23,857,392, resulted in net revenue of about $4.39 million (CAB 21, PJ [44]; CAB 61; FFC [51]).

16. Under its "museum concept" (more particularly dealt with below), any person could visit the showroom premises. Admission fees were charged to enter those premises. No part of the admission fees were, or could be, referable to any particular car and there was no guarantee that any particular car would be displayed at the premises on any given day.

17. The uncontested evidence before the primary judge was that the admission fees did not cover costs (*cf*, CAB 73; FFC [102]). Further, for the year ended 30 June 2017, the gross income derived from admission fees to the premises (approximately $1.32 million), while it helped to defray the marketing costs, must be viewed in the context of the gross income derived from car sales (approximately $28.43 million) (CAB 61; FFC [51]). The accounts were prepared on the basis that there was only ever one business, namely the buying and selling of cars (FFC [46], CAB 60). The appropriateness of this accounting was not

contested. The admission fee income was not separately shown in the financial statements of the Appellant but, like the figure for the losses referable thereto, needed to be separately calculated.

18. The Appellant had its sales office, clearly identified as such, in the showroom from the commencement date. Each of the cars on display was for sale (CAB 60-1; FFC [50]). The limited circumstances where a particular car might not be available for purchase were explained by the Appellant's sole director, Mr Denny. They included where the car had already been sold (but remained on hand until payment in full by the purchaser), or where the car required mechanical repairs or bodywork, or where the Appellant was in possession of the car but not title, or where the car was on consignment to another dealer.

19. None of the Assessed Cars was a static or permanent display (CAB 60, FFC [47]). Nor, with respect, is it right to say that there was an "exhibited collection" (*cf*, CAB 75; FFC [110]). Cars were moved and rotated around the showroom (CAB 60, FFC [47]). Sales commenced from the time the showroom opened and/or cars were sent offsite for mechanical repairs or paintwork from time to time.

The origin of the Appellant's business

20. Mr Denny was the controlling mind of the Appellant. After a very successful European venture, whereby he founded and promoted a highly successful chain of car dealerships that operated in Europe selling more than 1.5 million – mainly used – cars (CAB 64; FFC [62]), Mr Denny sought to establish the business of buying and selling prestige and classic cars in Australia (CAB 65; FFC [66]).

21. The idea of how best to present and market the Appellant's prestige and classic car dealership came to Mr Denny in 2013, when visiting the Lincoln Hotel in Las Vegas. Mr Denny stated that he had observed that (CAB 60; FFC [50]; AFM 36)):

> A dealership had cordoned off a section of the hotel and used that section to house a collection of classic cars. The section was referred to as a 'museum', with the vehicles arranged to highlight the changing look of them at their different times of manufacture. However, despite the presentation all of the cars were for sale …

22. Mr Denny saw an opportunity to create a more sophisticated dealership in Australia – the "Gosford Classic Car Museum".[1] As Logan J said, the business name is not determinative of anything; drawing a conclusion from the label given to the business premises is not a

[1] The Appellant was incorporated on 16 January 2015 as "North Shore Classic Cars Pty Ltd" (AFM 41).

substitute for undertaking a proper analysis of the Appellant's activities (CAB 51; FFC [8]).

23. The "museum" concept was implemented as an innovative means of marketing the Appellant's stock. Mr Denny, based on his decades of successful experience in the used car business, concluded that, to increase the potential for sales, he had to increase the numbers of those who would come to see whatever stock was displayed at the time in the showroom premises. As Logan J said, "[t]he 'museum concept' was the way in which the appellant sought to, and did, bring potential buyers in touch with its trading stock" (CAB 61; FFC [51]). Visitors to the showroom were both potential purchasers of cars and spruikers, either through social media and/or word of mouth (CAB 70; FFC [90] *cf*, CAB 75; FFC [109]). The marketing method employed by the Appellant was highly successful in getting people to the showroom premises (with over 100,000 persons visiting the premises during its first year of operation (CAB 61; FFC [51])) but that does not mean that it was something other than marketing. After all, these were unique, individual, classic and luxury cars, not indistinguishable models on a new car dealer's premises.

24. Mr Denny said in cross-examination "[w]ithout visitors, you don't have sales" (CAB 61; FFC [51]) and "[i]f you don't have the funnel feeding into the machine, you don't sell, you don't generate money" (CAB 61; FFC [51]). Mr Denny added that "[i]t was about making money … as you've seen the track record for the last 30 years. It's all about moving the metal, selling the cars" (CAB 65; FFC [70]).

25. The "museum" concept was a "means to an end" – the end being the sale of the trading stock (CAB 60; FFC [46]). Save as to one – presently irrelevant – matter,[2] Mr Denny's evidence was entirely accepted. As Brennan J (as his Honour then was) said in *Magna Alloys & Research Pty Ltd v FCT* (1980) 11 ATR 276 at 284-285:

> What the taxpayer has in mind may bear upon "the character of the business or undertaking" in showing the scope of his business or undertaking. The taxpayer is at liberty to determine for himself what the scope and nature of his business or undertaking shall be and how it shall be conducted, the Act having no effect upon those matters but taking "the result of the taxpayer's activities as it finds them": per Williams J in *Tweddle v FC of T* (1942) 7 ATD 186 at 190; 2 AITR 360 at 364 … thus what the taxpayer says are the character and scope of his business or undertaking is evidence of what its character and scope are in fact.

[2] What was not accepted was his explanation that the reason that the proposed admission fee for adults was increased from $16 to $20 was to discourage "tyre kickers" (CAB 30, PJ [80]).

26. Well prior to May 2016, the Appellant sought advice in respect of its luxury car tax obligations from the two firms who were respectively its tax agent, namely Fortunity Group Pty Ltd and PricewaterhouseCoopers. That advice was relevantly that the Appellant was complying in all respects with its luxury car tax obligations. Both advisors were aware that a fee for admission would be charged.[3] In January 2016, five months before the showroom opened, Fortunity Group Pty Ltd outlined the entire business plan to the Respondent including that all cars in the premises would be for sale and that a fee for admission would be charged.

The Assessed Cars

27. In applying the LCTA, each of the Assessed Cars must be considered individually (CAB 69; FFC [90]). The Appellant quoted its ABN at the time of acquiring each of the Assessed Cars, with the result that – consistent with the intended operation of the LCTA – no luxury car tax was payable on the acquisition by it of any of the Assessed Cars (CAB 52; FFC [15]).

28. By reference to the commencement date, the Respondent divided the Assessed Cars into two categories:

    a. the "Pre 28 May Cars" – the Respondent did not contest that the Appellant was entitled to "quote" under s 9-5 for the acquisition of each of these cars; and

    b. the "Post 28 May Cars" – the Respondent accepted that the Appellant quoted under s 9-5 for the acquisition of each of the cars in this category but argued that it did so incorrectly (though not improperly). The Respondent accepted however that each such quotation was nevertheless made effective by virtue of s 9-20.

29. The result of quoting for each car was that the taxing point under the LCTA shifted – as intended by the LCTA – to the point of retail sale by the Appellant, so long as each car remained trading stock. The Respondent conceded before the Full Court that, at all relevant times, each of the 40 Assessed Cars was, and remained, trading stock of the Appellant (CAB 50; FFC [3]; CAB 63; FFC [57]).

30. Each of the Assessed Cars relevantly only ceased to be trading stock of the Appellant when it was sold. Most of the Assessed Cars were sold more than 2 years after their entry for home consumption and hence were "more than 2 years old" (sub-s 5-10(3)) by the

[3] *Automotive Invest Pty Ltd and Commissioner of Taxation* [2022] AATA 673 at [10] and [12].

time they were sold. None of those sales was, any longer, a "taxable supply" (para 5-10(2)(b)). At least six[4] of the Assessed Cars were sold within the 2-year period and the sale of each of those cars therefore prima facie involved a "taxable supply" save where the car was sold overseas (para 5-10(2)(c)), or to another dealer who quoted (para 5-10(2)(a)). Three of the Assessed Cars remain to be sold.[5]

31. The Respondent's "notice of amended assessments of net amount" were issued on 18 January 2019 (AFM 51-52)) by which time the 2 year period in relation to many of the Assessed Cars had passed. The amended assessments, totaling $6,164,613, related to adjustments of the "net amount"[6] for tax periods commencing 1 April 2016 and ending 30 November 2017 made by the Respondent to both GST and luxury car tax for the Assessed Cars.

Part VI: Argument

32. The Appellant's case is based on a construction of paras 15-30(3)(c) and 15-35(3)(c) that requires a textual reading of the LCTA having regard to its underlying policy or plan. In the Appellant's respectful submission, the words "use the car for a purpose other than a *quotable purpose" should be construed as requiring an "alternative" rather than an "additional" use. It follows that, as long as a car continues, at all relevant times, to be used as trading stock, a quotable purpose, it is not relevantly being used for a "purpose other than a quotable purpose". Under the LCTA there cannot be, in the Appellant's respectful submission, more than one taxing point in relation to the same "quoted" vehicle where that vehicle is, at all times, held as trading stock of the business. Like any statute, the LCTA must be read and understood in accordance with its policy or plan.[7] This is particularly so in the case of sales tax legislation.[8]

33. Alternatively, display of a car in a showroom is not – and here was not – an additional other "use" as that display was not inconsistent with holding each of the Assessed Cars as trading stock. Properly construed, the LCTA contemplates that a vehicle held as trading stock will continue to be used for a "quotable purpose" where use of the vehicle is consistent with, or incidental to, or subservient to, that quotable purpose. Display of a car

[4] They are, of the Pre 28 May Cars: Ferrari F50 (stock no. #1174), Mercedes McLaren SLR (stock no. #1417). Of the Post 28 May Cars: Ford Mustang (stock no. #1692), Chevrolet Camaro (stock no. #1836), Aston Martin DB9 (stock no. #1846), Amphicar (stock no. #1811).
[5] A Lancia Astura (stock no. #1739), a VW Camper (stock no. #1810) and a Tatra (stock no. #1652).
[6] Defined in s 27-1 to have the meaning given by s 195-1 of GST Act. See also, s 17-5 of the GST Act.
[7] *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 (Dixon CJ).
[8] *DFCT v Ellis & Clark Ltd* (1934) 52 CLR 85; *Brayson Motors Pty Ltd (In liq) v FCT* (1998) 156 CLR 651.

for sale in the licensed showroom premises of a motor dealer, even where a charge is made for entry to those premises, is not a "disqualifying" use of the car.

34. Where a luxury car in respect of which a dealer has quoted is disposed of by that dealer, the LCTA will operate, as was intended, to require the payment of luxury car tax on that disposal to the customer (assuming that the customer does not themselves quote or that the car is not "more than 2 years old") (paras 5-10(2)(a), (b); see also, para 5-10(2)(c)). Tax is imposed on the retail sale and that is the intended single taxing point under the LCTA.

35. Luxury car tax is an indirect tax. From 1 July 2000, the LCTA replaced the former wholesale sales tax regime that applied to luxury cars (CAB 55; FFC [28]).

36. By reference to tax payable under the LCTA, three imposition Acts[9] were introduced to impose a single stage, retail sales tax (s 2-1, sub-s 2-5(2)) on "luxury cars" (s 25-1), namely cars whose value was higher than a nominated indexed[10] figure (the "luxury car tax threshold"[11]) (sub-ss 25-1(3)-(5)). It is not unusual to have a tax on retail sales in the form of an indirect, single stage, tax.[12]

37. Section 5-5 is headed "[l]iability for luxury car tax" and provides:

> You must pay the luxury car tax payable on any *taxable supply of a luxury car that you make.

38. Subsection 5-10(1) sets out what is a "taxable supply of a luxury car"[13] and states:

> (1) You make a ***taxable supply of a luxury car*** if:
>
> (a) you supply a *luxury car; 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 the indirect tax zone[14]; and
>
> (d) you are *registered, or *required to be registered.

39. The imposition Acts do not impose luxury car tax where that tax is not payable under the LCTA. Subsections 5-10(2) and (3) set out what is not a taxable supply of a luxury car:[15]

---

[9] *A New Tax System (Luxury Car Tax Imposition—General) Act 1999* (Cth); *A New Tax System (Luxury Car Tax Imposition—Customs) Act 1999* (Cth); *A New Tax System (Luxury Car Tax Imposition—Excise) Act 1999* (Cth).
[10] See sub-s 25-1(3A)-(6).
[11] Which for the year ended 30 June 2017 was $64,132, or $75,526 for fuel-efficient cars.
[12] *HP Mercantile Pty Ltd v FCT* (2005) 143 FCR 553, Hill J at 557 [10] (Stone and Allsop JJ agreeing).
[13] See s 7-10 for the definition of a "taxable importation of a luxury car".
[14] See ss 195-1 and 9-25 of the GST Act, defined to mean, essentially, Australia.
[15] See sub-s 7-10(3).

(2) … you do not make a ***taxable supply of a luxury car*** if:

(a) the *recipient *quotes for the supply of the car; or

(b) the car is *more than 2 years old; or

(c) you export the car in circumstances where the export is *GST-free under Subdivision 38-E of the *GST Act.

(3) A *car is more than 2 years old at the time of a supply if:

(a) for a car that has not been *imported—the car was manufactured more than 2 years before the time of the supply; or

(b) the car was *entered for home consumption more than 2 years before the time of the supply.

40. To maintain the single stage tax policy, and to avoid the problem of cascading tax, the LCTA permits an entity (ordinarily a car dealer or wholesaler) to "quote" its ABN (s 27-1) thereby ensuring that the luxury car tax is not payable when the car is acquired at the wholesale level (ss 2-5, 9-1). Quoting achieves this result by shifting the taxing point to the point of supply by the dealer (assuming it is not a sale to another dealer who quotes or a GST-free export under Subdivision 38-E of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("GST Act")). As Hill J said in *HP Mercantile Pty Ltd v FCT* (supra) at 557 [11]:

> … If nothing is done to avoid cascading, the tax levied at each taxing point will be imposed on a value which already will have included tax payable at the previous taxing point or points. Cascading was, at least partly, avoided by the Australian wholesale sales tax by a system of quotation of certificates, so that in its operation, the tax was payable on the last wholesale sale or, if there was no such wholesale sale, on an assumed value calculated as a proxy for the last wholesale sale: *Brayson Motors Pty Ltd (In liq) v Federal Commissioner of Taxation* (1998) 156 CLR 651 at 657.

41. Subsection 9-5(1) is wholly anticipatory in operation – it is based on an entity's "intention" to use a car for one of three permissible purposes "at the time of quoting". Those three purposes are:

a. "holding the car as trading stock, other than holding it for hire or lease"; or

b. "*research and development for the manufacturer of the car"; or

c. "exporting the car in circumstances where the export is *GST-free under Subdivision 38-E of the *GST Act".[16]

[16] These are the only quotable purposes; as sub-s 9-5(1) says, there is "no other" quotable purpose.

42. Once an entity has quoted, unless the quote was "improper" (ss 9-25, 9-30), the function of s 9-5 is spent; the LCTA, in the usual case, proceeds on the basis that even an incorrect quotation is effective (s 9-20).

43. The residual function then served by s 9-5 is to lend paras (a), (b) and (c), and only those paragraphs, to the definition of "quotable purpose" in s 27-1. Thus, "quotable purpose" is defined by s 27-1 as "a use of a *car for which you may *quote under section 9-5". The uses for which an entity may quote are limited to those three set out in paras (a), (b) and (c) – para (a), "holding the car as trading stock …" – is the relevant use here.

44. Circumstances that occur after the supply or importation of a car may mean that too much or too little luxury car tax may have been imposed. Accordingly, under Division 15 adjustments may be made to increase or decrease the net amount (s 15-1).

45. Subdivision 15-A is concerned with "[g]eneral adjustments". Subdivision 15-B is concerned with what are called "[c]hange of use adjustments" which occur after the acquisition by the person who has quoted. Though computed by reference to tax that would have been payable on the acquisition (if there had been no quotation), increasing adjustments under Subdivision 15-B do not, as such, operate to increase tax payable on the acquisition (sub-ss 15-30(4) and 15-35(4)).

46. If the Respondent is correct, where the car remains trading stock of the dealer and there is an additional use, that additional use gives rise to an increasing adjustment equal to the tax which would have been payable at the point of acquisition as if an effective quotation had not been made. But because the quotation remains effective, and as long as the car remains trading stock, its sale will still involve a taxable supply. This is where the possibility of double taxation arises.

47. Subsection 15-30(3) relevantly provides:

> **Changes of use--supplies of luxury cars**
>
> …
>
> (3) You have an ***increasing luxury car tax adjustment*** if:
>
> (a) you were supplied with a *luxury car; and
>
> (b) …
>
> (i) no luxury car tax was payable on the supply because you *quoted for the supply; …
>
> (ii) …; and
>
> (c) you use the car for a purpose other than a *quotable purpose.

48. Subsection 15-35(3) is in similar terms:

> **Changes of use--importing luxury cars**
>
> …
>
> (3) You have an ***increasing luxury car tax adjustment*** if:
>
> (a) you *imported a *luxury car; and
>
> (b) …
>
> (i) no luxury car tax was payable on the importation because you *quoted for the importation;
>
> …
>
> (ii) …; and
>
> (c) you use the car for a purpose other than a *quotable purpose.

49. In the Appellant's submission, Division 15 must be read in a way that results in an harmonious operation of the LCTA as a whole; this includes reading both Subdivisions 15-A and 15-B so that they operate temporally, i.e., giving effect to the 2 year rule in para 5-10(2)(b). Subdivision 15-B cannot be unlimited as to time. A change of use outside the 2 year period, when a disposal would no longer be taxable, cannot, in the Appellant's submission, be a "change of use" for Subdivision 15-B purposes. One may ask rhetorically "what policy or plan would that serve?" Likewise, the Appellant submits, Subdivision 15-B should be read so as not to give rise to an increasing adjustment where the relevant luxury car has at all times been maintained as trading stock, and upon its disposal, luxury car tax will be, or has already been, made payable (depending upon the 2 year period). This maintains the single stage retail sales tax policy. If it were otherwise, the potential for double recovery is obvious. The Appellant's construction provides certainty and avoids this potential risk; conversely, the Respondent's construction does neither.

50. In the Appellant's submission, s 27-1 (containing the definition of "quotable purpose"), imports only the "quotable purpose" in para 9-5(1)(a) into paras 15-30(3)(c) and 15-35(3)(c), so that each para (3)(c) should be read as follows (underlining added):

> (c) you use the car for a purpose other than <u>holding the car as trading stock …</u>.

51. This construction accords with the settled approach to the use of legislative definitions as made clear by this Court. As was observed in *Gibb v FCT* (1966) 118 CLR 628 at 635 (Barwick CJ, McTiernan and Taylor JJ), a legislative definition functions as an aid to construing the relevant statute and not as an operative provision:

> The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration,

> they are to be understood in the defined sense … Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way. …

52. In his Honour's oft-quoted judgment in *Kelly v The Queen* (2004) 218 CLR 216, McHugh J reaffirmed that a legislative definition is not an operative provision and gave clear guidance for its use (at 245 [84] and 253 [103]):[17]

> … a legislative definition is not or, at all events, should not be framed as a substantive enactment. …
> … the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. … once it is clear that the definition applies, the better — I think the only proper — course is to read the words of the definition into the substantive enactment and then construe the substantive enactment — in its extended or confined sense — in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.

53. Conversely, at FFC [56] (CAB 63), the majority (as did the primary judge (PJ [66], [78]; CAB 26 and 29) framed the issue by reference to whether the Appellant "used each of the cars for the purpose of holding the car as trading stock … and for no other purpose" (emphasis added) (see also, FFC [57] and [110]; CAB 63 and 75). That is not the language of paras 15-30(3)(c) and 15-35(3)(c).

54. Logan J, with respect, correctly framed the question at FFC [16] (CAB 53) (see also FFC [30]-[31], [33] and [35]; CAB 55-7).

55. Division 2 (ss 2-1 to 2-25) of Part 1 of the LCTA is entitled "Overview of the luxury car tax legislation". Section 2-1, headed "[w]hat this Act is about" provides:

> This Act is about the luxury car tax. It is a single stage tax that is imposed on supplies and importations of luxury cars and is in addition to any GST that may be payable. The tax is only calculated on the value of the car that exceeds the luxury car tax threshold.

56. Subsection 2-5(2) addresses the quoting system and provides:

> (2) There is a system of quoting which is designed to prevent the tax becoming payable until the car is sold or imported at the retail level. (Division 9)

---

[17] The approach of McHugh J in *Kelly*, notwithstanding his Honour dissented in that case, has been cited and applied by this Court and other courts at all levels. See *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 97 ALJR 711 at 725 [80] (Gordon and Edelman JJ); *Garlett v Western Australia* (2022) 96 ALJR 888 at 907 [71] (Kiefel CJ, Keane and Steward JJ); *Sunlite Australia Pty Ltd v FCT* (2023) 296 FCR 600 at 602-603 [8] (Colvin, O'Sullivan and Feutrill JJ); *Cranbrook School v Woollahra MC* (2006) 66 NSWLR 379 at 388 [39] (McColl JA; Beazley JA agreeing).

57. Division 9 of Part 2 of the LCTA is headed "Quoting". Section 9-1 sets out what the Division is about and states:

> In certain circumstances you can quote for a supply or importation of a luxury car and not pay the luxury car tax. This is designed to avoid the luxury car tax becoming payable unless the car is sold or imported at the retail level.

58. Sections 2-1, 2-5 and 9-1 are "explanatory sections" and are not operative provisions (s 23-10) – however, they form part of the LCTA (s 23-1) and may be used in interpreting an operative provision in the circumstances set out in paras 23-10(2)(a), (b) and (c) which provide as follows:

> (2) Explanatory sections form part of this Act, but they are not operative provisions. In interpreting an operative provision, an explanatory section may only be considered:
>
> (a) in determining the purpose or object underlying the provision; or
>
> (b) to confirm that the provision's meaning is the ordinary meaning conveyed by its text, taking into account its context in this Act and the purpose or object underlying the provision; or
>
> (c) in determining the provision's meaning if the provision is ambiguous or obscure; …

59. It could not, with respect, be suggested that the precise expressions of legislative purpose in ss 2-1, 2-5 and 9-1 are at a level of generality which would make them unsteady guides to interpreting the LCTA.[18] They are specific statements as to the intended policy or plan and inform the intended operation of the LCTA, and therefore, the construction of its provisions, including paras 15-30(3)(c) and 15-35(3)(c).[19]

60. The underlying policy – that luxury car tax is intended to be both a single stage and a retail (not wholesale) sales tax – is evident from ss 2-1, 2-5 and 9-1. It is designed to "avoid" or "prevent" the tax becoming payable at the earlier point. That policy is also expressed, clearly and repeatedly, in the Explanatory Memorandum for the *A New Tax System (Luxury Car Tax) Bill 1999* ("EM"), and the system of quoting in the LCTA is expressly identified as a means to fulfil that policy: see [1.2], [1.4], [1.22], [2.3], [2.25], [5.4], [5.8] and [5.9]. To illustrate, the EM states:

> ***Overview***
>
> 1.1 The A New Tax System (Luxury Car Tax) Bill 1999 (LCT Bill) introduces a luxury car tax, from 1 July 2000. It is a single stage tax …

---

[18] *Cf Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47-48 [51]-[53] (Hayne, Heydon, Crennan and Kiefel JJ).

[19] See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ).

1.2 In particular, the LCT Bill:

…

- allows a system of quoting which is designed to avoid the tax becoming payable until the car is sold or imported at the retail level;

…

- provides for adjustments to the net amount that arise out of circumstances that occur after the supply or importation of the luxury car …

…

1.3 **Chapter 2** … also provides information on the system of quoting in respect of a luxury car, to prevent the tax becoming payable until the car is sold or imported at the retail level. …

…

2.3 When you quote in respect of a supply of a luxury car, no luxury car tax is payable for that supply. This system of quoting is designed to prevent luxury car tax becoming payable until the car is sold or imported at the retail level.

…

What is not a taxable supply of a luxury car

2.25 Not all supplies of cars are subject to luxury car tax. … The main circumstance where a supply is not a taxable supply is where a person 'quotes' for the supply of the car. This is a special feature of the luxury car tax that allows registered entities to delay the incidence of tax until the retail sale.

Policy objective

…

5.2 Under the present wholesale sales tax (WST) system, if the wholesale value of a car exceeds the luxury threshold ($55,720 tax inclusive retail price), tax is applied at the general rate of sales tax (22%) up to the threshold, with a special 45% rate applying to the excess.

5.3 The policy objective of this measure is to maintain existing Government policy with respect to the taxation of luxury cars …

5.4 The policy objective will be achieved by introducing a retail tax … on luxury cars … To exclude wholesale transactions, a registered entity will be able to quote if the car is to be used for certain purposes (eg. held for trading stock) …

5.7 The implementation of the luxury car tax will occur against the background of the removal of the WST and the implementation of the GST.

Implementation of policy

5.8 To achieve the effect of replacing the WST luxury car rate, the luxury car tax will generally be levied at the point of retail sale.

Quoting

5.9 To ensure that tax is paid at the retail level a system of quotation will be implemented. … luxury car tax is not payable if the registered recipient intends to use the car as trading stock unless it is held for hire or lease …

61. The intention to defer the taxing point – by use of the quotation system – until the car is sold at the retail level is further confirmed by the Second Reading Speech for the *A New Tax System (Luxury Car Tax) Bill 1999*, where the Treasurer (Mr Costello MP) stated that the "luxury car tax will make up for the removal of the wholesale sales tax luxury loading" and "[a] quotation system will ensure that the incidence of the tax is delayed until the car is sold at the retail level".

62. The LCTA, in conjunction with the GST legislation, replaced the sales tax regime that had existed in Australia since 1930. The LCTA was, with respect, properly construed by Logan J as "a particular type of sales tax legislation", his Honour noting that "[t]here is nothing 'new' in Australia about a sales tax" (CAB 55; FFC [28]; see also, CAB 57; FFC [35]).

63. That the LCTA, a sales tax Act, should be read and construed in accordance with its plan or policy, finds strong support in the judgments of this Court in *Ellis & Clark* and *Brayson Motors* (supra), both of which emphasise the importance of policy in the particular context of sales tax legislation.

64. In *Ellis & Clark*, the Commissioner argued that sales of second-hand goods were liable to sales tax because the sales were by a registered person. The Court rejected this argument. Starke J observed that the Commissioner's view was entirely opposed to the plan of the *Sales Tax Assessment Acts* noting that "[t]he tax is not levied upon successive sales". His Honour added that the effect of the Commissioner's argument was to permit, rather than obviate, the possibility of double taxation (at 88).[20]

65. The reasoning in *Ellis & Clark* was applied in *Brayson Motors*. In *Brayson Motors*, the taxpayer, a retailer of motor vehicles was also registered as a "wholesale merchant" under the *Sales Tax Assessment Acts* in respect of its wholesale business in vehicle spare parts. The taxpayer made both retail and wholesale sales. The Commissioner relied upon the taxpayer's registration in assessing it to all sales – both wholesale and retail – under the *Sales Tax Assessment Acts*. The High Court (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ) unanimously held that the taxpayer was not liable to sales tax on retail sales. Their Honours noted the effect of *Ellis & Clark* which was that the provisions of the *Sales Tax Assessment Acts* "should be read down, by reference to the overall plan of the sales

[20] See too Dixon J at 89. In circumstances such as the circumstances of this case, double taxation remains a real possibility (compare subs-ss 5-15, 17-5 and Division 18).

tax legislation" and that there were "equally powerful considerations which require that those provisions should be read down to exclude sales of goods which are distinct from the particular business or activities by reason of which the vendor is or is required to be registered under the sales tax legislation" (at 660). To construe the *Sales Tax Assessment Acts* otherwise "would be contrary to fundamental features of the 'whole plan' of the legislation" (at 660).

66. There will, on the Appellant's construction, be an increasing adjustment where a quoted car ceases to be trading stock because, for example, it is used for a private purpose (e.g., gifted to a family member) or is converted to use as a capital asset. Such changes of use are deemed disposals of trading stock for income tax purposes, but not for LCTA purposes.[21] Such changes of use would result in the car not reaching the intended luxury car tax taxing point (i.e., sale at the retail level).

67. The Appellant's construction of paras 15-30(3)(c) and 15-35(3)(c) is, with respect, further assisted by the deliberate change in language from the decreasing adjustment provisions preceding them in the same Subdivision (see paras 15-30(1)(e) and 15-35(1)(e)). Those paragraphs employ the words "you have only used the car for a quotable purpose" (emphasis added).[22] There is then a deliberate switch in language to "you use the car for a purpose other than a *quotable purpose" (emphasis added). At the very least this leaves open the construction for which the Appellant contends. In the Appellant's submission, this construction should be preferred because it accords with the policy or plan of the LCTA and provides certainty for the person carrying on the business.

68. On the other hand, the construction for which the Respondent contends would produce other results for car dealers which, in the Appellant's submission, would run counter to the expressed policy or plan of the LCTA, allow for the possibility of double taxation and lead to uncertainty. Thus, if the Respondent is correct, using a "luxury car" as a demonstrator vehicle in addition to its use as trading stock, will be using the car for a purpose "other than" a quotable purpose within para 15-30(3)(c). The Respondent has adopted a practice of allowing dealers to quote for demonstrator vehicles (see

[21] See s 70-110 of the *Income Tax Assessment Act 1997* (Cth).

[22] It is settled that the same words in an Act generally have the same meaning, but "where different words are used a change of meaning is intended": *King v Jones* (1972) 128 CLR 221 at 266 (Gibbs J). The strength of this proposition can of course vary depending on the circumstances, but it should be given particular weight where, as here, the differing language finds itself in the same section(s) (ss 15-30 and 15-35). That differing language is also in subsections (sub-ss 15-30(1) and 15-30(3); 15-35(1) and 15-35(3)) that were introduced at the same time (on enactment of the LCTA) and have remained unchanged since.

ATO Guide to Luxury Car Tax NAT 3394[23]) but this – non-binding – practice acknowledges, rather than answers, the problem. Similarly, providing a floating charge over assets including motor vehicle trading stock, floor plan financing, exhibiting a "luxury car" in a trade or motor show, or permitting a motor writer to test drive the car would all be potential additional uses which, on the Respondent's case, would give rise to an increasing adjustment.

69. As Logan J stated (CAB 57; FFC [35]):

> Accepting as I do that the purpose of the LCT Act is to impose a single stage sales tax at the retail sales level, a construction of its text which leads to the imposition of that tax while the motor vehicle concerned remains held as trading stock is incongruous. Further, given that "other than" appears in a fiscal integrity measure, it is difficult to see how that purpose is served by dictating an increasing adjustment while the motor vehicle concerned remains held as trading stock.

70. Further or alternatively, in the Appellant's submission and as Logan J held, uses which are incidental or subservient to, or not inconsistent with, a continuing use by a dealer of a vehicle as trading stock should not be considered to be a use for a purpose other than a "quotable purpose" (CAB 57-9; FFC [37]-[42]).

71. This approach to construction finds support in the judgment of Griffith CJ in *Down v Attorney-General* (Qld) (1905) 2 CLR 639. The question before the High Court in that case was whether land was granted to trustees in trust "for cricket and other athletic sports and for no other purpose whatsoever", and if so the permitted uses of that land. Griffith CJ stated at 652:

> … the appellants are entitled to permit the use of the reserve in question for any lawful purpose not inconsistent with its use … as a place for holding athletic sports, and in particular for any purpose which, while not interfering with such use, is conducive to the main object of the trust …

72. In *Salvation Army (Vic) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159, [24] the appellant owned certain lands that were used for the purpose of conducting a boys' training farm for delinquent, wayward or underprivileged boys. As part of the activities of the training farm, pigs and cattle were raised, fruit and flowers were grown, and a herd of milking cows was kept and milked. The produce of the farm was sold, realizing an annual sum of approximately £4,000. This sum was applied in reduction of

---

[23] Now reproduced at <https://www.ato.gov.au/Business/Luxury-car-tax/When-LCT-doesn-t-apply/Quoting-an-ABN/> (QC 22113; last modified 8 January 2016). This Guide is not a Public Binding Ruling and hence is not binding on the Respondent.

[24] See too *London Borough of Merton Council v Nuffield Health* [2023] UKSC 18.

the costs of conducting the farm and the boys' homes, which were in fact conducted at a loss. The question was whether the lands were used "exclusively for charitable purposes" under the *Local Government Act 1946* (Vic). Dixon CJ, Williams and Webb JJ stated at 172 and 173 (citations omitted):

> If the land is used for a dual purpose then it is not used exclusively for charitable purposes although one of the purposes is charitable. But if the use of the land for a charitable purpose produces a profitable by-product as a mere incident of that use the exclusiveness of the charitable purpose is not thereby destroyed.
>
> …
>
> There is no distinction in principle between selling the surplus proceeds of a charitable activity and making a charge for supplying a charitable activity such as an educational performance or meals and beds in a hostel for the needy, yet in the case of the *Royal Choral Society* it was held that the fact that the performance of plays produced a profit and in *Municipal Council of Sydney v Salvation Army (N.S.W. Property Trust)* the fact that a charge was made in some instances for beds and meals in a hostel did not destroy the exclusiveness of the charitable purpose.

73. So too, in *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54, Windeyer J said at 93-4 (citations omitted):

> The words "exclusively" and "solely" are familiar in fiscal and rating law. Where an exemption from rating depends upon the use of land exclusively for a particular stated purpose, then the use must be for that purpose only … The question arises, for example, when part of the subject land is used for the relevant purpose and another part for a different purpose … The presence of "exclusively", "solely", or "only" always adds emphasis; and is not to be disregarded … When such words are present, it is a question of fact whether the land is being used for any purpose outside the stipulated purpose … As Kitto J. said in *Lloyd v. Federal Commissioner of Taxation*, such words confine the use of the property to the purpose stipulated and prevent any use of it for any purpose, however minor in importance, which is collateral or independent, as distinguished from incidental to the stipulated use. Even without such words, an exemption from rating based upon use or occupation for a particular purpose or in a particular manner can only apply when the property is so used that it can properly be described as used for that purpose or in that manner, any other user being merely incidental, or at least not inconsistent with such main user.

74. The position is akin to the provision of services to University staff and students through leased commercial premises considered by the High Court in *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633. In that case, even though rents were received by the University, the use of the land was determined by reference to the broader context in which those services were provided. As Gibbs ACJ said at 644:

> … it is proper to conclude from the evidence that the University arranged for the building to be

> erected on the market because the commercial enterprises which it was to contain were regarded as necessary or desirable for the functioning of a university under modern conditions. …
>
> The use of the land was wholly ancillary to, and directly facilitated, the carrying out of the principal objects of the University; it was not collateral or additional to those purposes.

75. The display of each of the Assessed Cars – when they were displayed – by the Appellant in its showroom was not a separate use; but even if it was, it was a use which was not inconsistent with holding each car as trading stock. It was incidental or subservient to and/or consistent with the use of holding those cars as trading stock and thus was not relevantly an "other" use notwithstanding the charging for admission to the premises.[25]

GST

76. No part of the admission fees involved a "supply" of any one of the Assessed Cars for the purposes of the GST Act. GST here is concerned with the acquisition by the Appellant of some, though not all, of the Post 28 May Cars.

77. Section 69-10 of the GST Act limits the amount of input tax credits claimable if, relevantly, "you are not, for the purposes of the *A New Tax System (Luxury Car Tax) Act 1999*, entitled to quote an *ABN in relation to the supply to which the creditable acquisition relates, or in relation to the importation, as the case requires". Thus, s 69-10 of the GST Act specifically invokes s 9-5 of the LCTA. There will be no GST payable on any of the Post 28 May Cars if the Appellant was entitled to quote because each of those cars was intended to be used for the purpose of "holding the car as trading stock, other than holding it for hire or lease".

78. In the Appellant's submission, the words in the chapeau of s 9-5 "and for no other purpose" should be read as "no other quotable purpose"; alternatively, having regard, in particular, to para 9-5(1)(a), they too should be read so as to exclude an alternative rather than an additional use. The exclusion in para 9-5(1)(a) ("other than holding it for hire or lease") is clearly premised on the notion that a car might both be held as trading stock and – additionally – hired or leased (as was the case in *FCT v Cyclone Scaffolding Pty Ltd*

[25] See *Salvation Army* (supra) at 170-171 (Dixon, Williams and Webb JJ): "We do not understand the judgment [in *Shire of Nunawading v Adult Deaf & Dumb Society of Victoria* (1921) 29 CLR 98] as deciding that land is not used exclusively for charitable purposes where the charity derives some subsidiary and incidental benefit from the carrying out of that [charitable] use".

(1987) 18 FCR 183; *cf*, CAB 70; FFC [94]). That exclusion would be otiose if using the car "for … no other purpose" excluded additional use.

Part VII: Orders sought

79. The appeal be allowed.

80. Set aside orders 1 and 2 made by the Full Court of the Federal Court of Australia on 11 August 2023 and, in their place, order that:

    a. the appeal against the Respondent's objection decision be allowed;

    b. the objection decision be set aside, and the Appellant's objection be allowed;

    c. the Respondent pay the Appellant's costs.

81. The Respondent pay the Appellant's costs of this appeal.

Part VIII: Time required for oral argument

82. The Appellant estimates it will require 4 hours for oral argument, including reply.

Dated: 1 February 2024

DAVID H BLOOM KC
(02) 9235 0170
bloomkc@newchambers.com.au

KENI JOSIFOSKI
(02) 9151 2014
josifoski@newchambers.com.au

JAKUB P PATELA
(03) 9225 6908
jakub.patela@vicbar.com.au

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the particular statutes and statutory instruments referred to in these submissions:

- *A New Tax System (Luxury Car Tax) Act 1999* (Cth) – historical version (effective from 10 March 2016 to 20 October 2016).
- *A New Tax System (Goods and Services Tax) Act 1999* (Cth) – historical version (effective from 5 March 2016 to 30 June 2016).
- *A New Tax System (Luxury Car Tax Imposition—General) Act 1999* (Cth) – current version (effective from 3 October 2008).
- *A New Tax System (Luxury Car Tax Imposition—Customs) Act 1999* (Cth) – current version (effective from 3 October 2008).
- *A New Tax System (Luxury Car Tax Imposition—Excise) Act 1999* (Cth) – current version (effective from 3 October 2008).
- Gosford Local Environmental Plan 2014 – historical version (effective from 11 March 2016 to 4 August 2016).
- *Income Tax Assessment Act 1997* (Cth) – historical version (effective from 6 May 2016 to 29 June 2016).
- *Motor Dealers and Repairers Act 2013* (NSW) – historical version (effective from 2 December 2014 to 7 July 2016).