HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S170/2023
File Title: Automotive Invest Pty Limited v. Commissioner of Taxation

Registry: Sydney

Document filed: Form 27D - Respondent's submissions
Filing party: Respondent
Date filed: 29 Feb 2024

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **Automotive Invest Pty Ltd**
Appellant

and

10 **Commissioner of Taxation**
Respondent

RESPONDENT'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 central issue in the appeal is the Appellant's contention that the phrase "you use the car for a purpose other than a quotable purpose" in the increasing adjustment provisions of ss 15-30(3)(c) and 15-35(3)(c) of the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) (**LCTA**) means an "alternative" use: Notice of Appeal, [3], Appellant's Submissions (**AS**) [32], [35]-[69]. The Appellant accepts that its use of each of the 40 cars in issue for the purpose of display in the Gosford Classic Car Museum (**Museum**) was an additional use, but says this does not matter because the car was also used for the purpose of holding it as trading stock. In Notice of Appeal, [2] and [4], the Appellant contends that the policy of the LCTA supports its construction.

3. The AS raise the alternative case that a use which is incidental or subservient to and/or not inconsistent with a use for a quotable purpose does not engage the increasing adjustment provisions and that, on the facts, the Appellant's use of the cars in issue was such a use: AS [2(b)], [2(c)], [33], [70]-[75]. These arguments are not supported by the Notice of Appeal.

4. The AS also raise an argument about s 69-10 of the *A New Tax System (Goods and*

Services Tax) Act 1999 (Cth) (**GSTA**) and s 9-5(1) of the LCTA: AS [76]-[78]. This is also outside the Notice of Appeal.

5. These submissions address those additional arguments for completeness in the event that the Appellant is permitted to expand its grounds of appeal.

6. References in these submissions to statutory sections are references to sections of the LCTA, unless indicated otherwise.

Part III: Section 78B notices

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

Part IV: Contested material facts

10 8. It is not a fair characterisation of the evidence that "the admission fees did not cover costs" of the Museum, as asserted in the first sentence of AS [17]. As the Full Court identified at FC [102] (CAB 73), it was submitted on behalf of the Appellant during the Commissioner's audit that for the nine months to 31 March 2017, income from admissions and merchandise sales totalled approximately $1.036m, with associated overheads and operational expenses totalling approximately $1.066m. While the figures were from the Appellant's in-house bookkeeper, the "associated overheads" were not identified nor was their basis of allocation, as the Full Court noted at FC [102].

9. For the proposition that the Appellant prepared its accounts on the basis that it had only "one business" that was "the buying and selling of cars", AS at [17] cites the dissenting
20 reasons of Logan J at FC [46] (CAB 60), but that paragraph does not support the proposition. Rather, Logan J at FC [46] identified that the Appellant's financial statements reported admission fees in the same line item as car sales. Further, the appellant's financial statements (for the 2016-2019 financial years) are not detailed and were all prepared in 2020, after the Appellant lodged its objections to the assessments in issue in 2019.[1]

10. Contrary to AS [8] and [18], not all of the hundreds of cars displayed in the Museum were for sale (the Respondent accepts that the 40 cars in issue were). The Appellant's website referred to "many" of the cars in the Museum being for sale.[2] Contemporaneous correspondence from a tax adviser then acting for the Appellant to Mr Denny advised

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[1] 2017: AFM at 18, 19 32, 34 (dates) and 17, 29 (reference to dispute with ATO); 2016: Respondent's Further Materials (**RFM**) at 7, 8, 9, 10; 2018: RFM at 14, 15, 26, 28.
[2] PJ [22] (CAB 14); FC [107] (CAB 74); RFM at 40.

him that, in advance of a scheduled ATO inspection, the Appellant should "remove the bulk of signs which state[d] [that] … cars are not for sale".[3] Videos from the Museum's operation showed that visitors were under the impression that some cars were for sale and others were not.[4] A Statement of Environmental Effects prepared on behalf of the Appellant and submitted to council in 2017 referred twice to "most" of the cars in the Museum being for sale,[5] as opposed to all of the cars being for sale.

11. The proposition that the appellant was advised that it "was complying in all respects with its luxury car tax obligations" (AS [26], second sentence) is not supported by the evidence or the findings in the penalty proceedings *Automotive Invest Pty Ltd v*
10 *Commissioner of Taxation* [2022] AATA 673 (no appeal was filed) at [40]-[41], [60].

Part V: Argument

Summary

12. The LCTA imposes luxury car tax (**LCT**) on "supplies", "importations" and "adjustments" in respect of luxury cars. Where the recipient or importer "quotes" in relation to the car, the supplier or importer is relieved of LCT on that supply or importation. An entity is "entitled" to quote when, relevantly, its intended use of the car is for one of three enumerated purposes and it has no other purpose for which it intends to use car.

13. "Adjustments" apply when an entity's actual use of the car differs from its intended use
20 as indicated by its quoting or not quoting; the effect of an adjustment is to increase or decrease the LCT impost to the "correct"[6] level so that the overall LCT impost reflects whether the actual use of the car is one of the uses for which, had it been the intended use, the entity would have been entitled to quote.

14. The language of the key provisions of the LCTA (ss 9-5(1), 15-30(1)(e), (3)(c) and 15-35(1)(e), (3)(c)) is unambiguous in creating a cohesive regime in which there is a symmetry between the uses of a car that result in imposition of or relief from the LCT at the time of a supply or importation (based on intended use) and at the time of a potential adjustment (based on actual use).[7] At each of those times, the statutory

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[3] PJ [50]-[51] (CAB 23); RFM at 51.
[4] PJ [48], [50] (CAB 23).
[5] PJ [40] (CAB 20); RFM at 58, 72.
[6] Explanatory memorandum to the *A New Tax System (Luxury Car Tax) Bill 1999* (Cth) (**EM**) [3.17], [3.26]-[3.27].
[7] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 381-82 [70].

criterion for relief from the LCT is use (intended or actual) *solely* for one of the purposes set out in s 9-5(1)(a)-(c) (or for purposes which are solely within (a)-(c)).

15. To avoid this outcome, the Appellant seeks to re-word the straightforward statutory language by fastening on its twin propositions that: (1) the LCT is a "single stage, retail sales tax"; and (2) failure to embrace its construction would risk double taxation or taxation on a change of use occurring at an unlimited period in the future.

16. As to the first proposition, that description – drawn from the non-operative provisions and extrinsic materials – is not a complete description of the policy of the LCTA, nor does it accurately reflect the operation of the LCTA.[8] The LCT is *generally* imposed only on one occasion and *generally* on a retail sale.[9] But not always. The LCTA contains a specific provision (s 5-15(2), (3)) dealing with subsequent imposts of LCT on the same car and eliminates the possibility of double taxation by reducing the amount of such subsequent imposts by the amounts of earlier LCT imposts.

17. As to the second proposition, s 5-15(2) and (3) ensure that double taxation cannot occur, and s 13-10(2) limits the period during which adjustments can be made to four years after the supply or importation of the car.

18. The Appellant's alternative case is that a use which is "incidental or subservient to, and/or not inconsistent with" a quotable purpose (here, holding the car as trading stock) does not result in an increasing adjustment, and that its use of the cars for the purposes of its Museum operations was such a use. This is incorrect as a matter of construction; the sections do not provide for a use for an additional purpose, whatever its character, and whether or not it is an incidental, subservient and/or not inconsistent purpose. Even if they did, the case would fail on the facts. The evidence demonstrates that the use of the cars for the purpose of the Museum operations was separate and substantial; it was not merely an incident of, subservient to or consistent with the purpose of holding the cards as trading stock.

The legislative scheme of the LCTA and the GST

19. The LCTA was legislated in 1999 along with the GST and the wine equalisation tax as

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[8] *Carr v Western Australia* [2007] HCA 47; (2007) 138 CLR at 142-43 [5]-[7].
[9] EM [5.8]: "the luxury car tax will generally be levied at the point of retail sale."

part of the package for "*a new tax system*"[10] which replaced the wholesale sales tax regime.[11] The prior regime had differential tax rates for cars depending on their value.[12]

20. Part of the rationale for introducing the LCT was to ensure that, following the introduction of the GST, the tax-inclusive price of luxury cars would fall by about the same amount as that of a car below the luxury car tax threshold.[13]

21. The LCTA complements the GSTA and each Act refers to the other.

22. GST at 10% applies to a taxable supply of a car: s 9-5 of the GSTA; and to a taxable importation of a car: Division 13 of the GSTA.

23. The LCTA also applies to a taxable supply or a taxable importation, and adopts those definitions from the GSTA,[14] but its base is only cars with prices over a certain threshold; these are termed a "luxury car". Over the tax periods in issue, the threshold went from $75,375 to $75,526 for fuel efficient cars and $63,184 to $65,094 for other cars.[15] The LCT rate of 33% is applied to the part of the luxury car tax value which exceeds the threshold: s 5-15 of the LCTA. In the case of a supply, it is only taxable if, among other things, the car is not "more than 2 years old" (defined in s 5-10(3)).

24. For GST purposes, the input tax credit on an acquisition or importation of a "luxury car" is capped at the LCTA threshold, unless the acquirer or importer is entitled to quote under the LCTA: s 69-10 of the GSTA.[16]

LCTA provisions

25. Under ss 5-5 and 7-5 of the LCTA, luxury car tax is payable on the taxable supply or importation of a luxury car. However, there is an exception if the recipient (in the case of a supply) or the importer (in the case of an importation) "quotes" for the supply or importation: ss 5-10(2)(a) and 7-10(3)(b).

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[10] There were 43 Acts passed by the Commonwealth Parliament in 1999 and 2000 as part of the A New Tax System (**ANTS**) package, of which 20 were the indirect tax measures, including the GSTA, LCTA and the corresponding customs, excise and general Imposition Acts.
[11] The ANTS legislation also replaced 9 State taxes. For background to the introduction of the ANTS see Treasury, 'Tax Reform: Not a New Tax, a New Tax System' (Tax Reform Plan, Australian Government, August 1998) (**Treasury ANTS Whitepaper**); Bills Digest to *A New Tax System (Goods and Services Tax) Bill 1998*.
[12] For example, *Sales Tax Assessment Act 1992* (Cth) s 42A; *Sales Tax (Exemptions and Classifications) Act 1992* (Cth) Sch 3 item 1.
[13] EM at 1; Second Reading Speech to *A New Tax System (Luxury Car Tax) Bill 1999* (Cth); Treasury ANTS Whitepaper at 89.
[14] LCTA s 27-1, definitions of "import", "indirect tax zone", "supply" and "taxable supply".
[15] LCTA s 25-1(3), (3A), which relevantly pick up s 40-230(3) of the *Income Tax Assessment Act 1997* (**ITAA 1997**) and the indexing in Subdiv 960-M of the ITAA 1997.
[16] GSTA, s 195-1, definition of "car limit".

26. Division 9 and Subdiv 15-B of the LCTA deal, respectively, with an entity's entitlement to quote and increasing or decreasing adjustments. They set out a scheme under which the entitlement to quote depends on the intended use of the relevant car, and the adjustments apply if the actual use of the car differs from the intended use indicated by the taxpayer's quote or lack of quote.

27. Section 9-5(1) provides (underlining added):

> You are entitled to *quote your *ABN in relation to a supply of a *luxury car or an *importation of a luxury car if, at the time of quoting, you have the intention of using the car for one of the following purposes, <u>and for no other purpose</u>:
>
> (a) holding the car as trading stock, other than holding it for hire or lease; or
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> (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.

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28. The underlined words provide for a sole purpose test – a taxpayer who intends to use a car for a purpose listed there and for an additional purpose not listed is not entitled to quote. That additional purpose is an "other purpose". That construction as a sole purpose test is confirmed by the EM at [1.10] (underlining added):

> Registered entities may quote in relation to the supply or importation of a luxury car. The quoting system is designed to avoid the tax becoming payable until the car is sold or imported at the retail level. Generally, a recipient is entitled to quote if the car supplied to them is expected to be held <u>solely</u> as trading stock.

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29. A quote is effective even if the entity quoting is not entitled to quote (s 9-20), the result of which is that the acquirer of a car may relieve the supplier (or itself, in the case of an importation) from LCT even though it is not entitled to do so.

30. Section 9-20 is subject to an exception in s 9-25 if, relevantly, the person "to whom the quote is made" has reasonable grounds for believing that the entity quoting is not entitled to quote. Thus, a quote is only rendered ineffective if the person to whom the quote was made has reasonable grounds for believing that the quoting entity's statement as to that quoting entity's intended use of the car is incorrect. Accordingly, an incorrect quote is effective regardless of whether the entity quoting incorrectly did so deliberately or innocently, provided that the other person is ignorant of its being incorrect.

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31. If the taxpayer's actual use of a car is different from the intended use indicated by the taxpayer quoting or not quoting, the adjustment provisions of Subdiv 15-B apply.

32. Section 15-30(1) provides (underlining added):

> You have a decreasing luxury car tax adjustment if:
>
> (a) you were supplied with a * luxury car; and
>
> (b) luxury car tax was payable on the supply because you did not * quote for the supply; and
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> (c) you were * registered at the time of the supply; and
>
> (d) you intend to use the car for a * quotable purpose; and
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> (e) you have <u>only used the car for a quotable purpose</u>.

33. The equivalent provision for an imported car is in s 15-35(1).

34. A taxpayer has a decreasing LCT adjustment (decreasing its liability to LCT) if LCT
10 was previously payable because it did not quote, but it intends to use the car for a "quotable purpose"[17] and it has "only used the car for a quotable purpose": ss 15-30(1)(e), 15-35(1)(e). There is thus a reduction in LCT to offset the impost on the supply or importation where the taxpayer did not quote but its actual use of the car is such that, had that been its intended use, it would have been entitled to quote.

35. Section 15-30(3) provides (underlining added):

> (3) You have an increasing luxury car tax adjustment if:
>
> (a) you were supplied with a * luxury car; and
>
> (b) either:
>
> (i) no luxury car tax was payable on the supply because you * quoted for the supply; or
>
> 20
>
> (ii) you had a decreasing luxury car tax adjustment under subsection (1); and
>
> (c) you <u>use the car for a purpose other than a * quotable purpose</u>.

36. The equivalent provision for an imported car is in s 15-35(3).

37. A taxpayer has an increasing LCT adjustment (increasing its liability to LCT) if LCT was not previously payable because it quoted but it uses the car "for a purpose other than a quotable purpose": ss 15-30(3)(c), 15-35(3)(c). There is thus an increase in LCT to recoup the LCT avoided at the time of the supply or importation because the taxpayer quoted but where it actually used the car for "a purpose other than" a quotable purpose.

30 38. This legislative scheme effects a symmetry between the intended uses that result in a LCT impost and the actual uses that result in an overall LCT impost by providing for an adjustment if there is a mismatch between the two. Thus, if a taxpayer's "only" use of

[17] A "quotable purpose" is a use of a car for which a taxpayer may quote under s 9-5: s 27-1.

the car was for a quotable purpose but it did not quote and so LCT was previously payable, it has a decreasing LCT adjustment to reverse the previous LCT impost as its actual use, had it been the intended use, would have entitled it to quote: ss 15-30(1), 15-35(1). Equally, if a taxpayer quoted and so LCT was not previously payable but it uses the car "for a purpose other than a quotable purpose", then it has an increasing LCT adjustment as its actual use, had it been the intended use, would not have entitled it to quote: ss 15-30(3), 15-35(3).

39. A taxpayer that intends to use, and actually uses, a car for two purposes – one quotable and one not – is not entitled to quote; however, if they do quote, the quote is nonetheless effective (ss 9-20, 9-25) and so LCT is avoided.

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40. Unless ss 15-30(3)(c) and 15-35(3)(c) are construed consistently with s 9-5(1), there is no increasing LCT adjustment to offset the avoidance of LCT by that misquoting.

41. Contrary to AS [67], the difference in language between ss 15-30(1)(e) and 15-35(1)(e) and that of ss 15-30(3)(c) and 15-35(3)(c) reinforce the Respondent's construction that the latter provisions provide for a sole purpose test under which any purpose in addition to a quotable purpose causes the increasing adjustment to occur. The word "only" is included in the former provisions because those provisions deal with a taxpayer who has used the car for only one purpose and that purpose is a quotable purpose – where the taxpayer's sole use of the car is for a quotable purpose, it is relieved from the previous LCT impost by a decreasing adjustment. In contrast, the word "only" is absent from the latter provisions because those provisions deal with a taxpayer who has used the car for one or more different purposes and at least one of those purposes (hence, "<u>a</u> purpose") is "other than" a quotable purpose – where the taxpayer has not solely used the car for a quotable purpose, LCT is imposed by an increasing adjustment.

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42. Two further aspects of the legislative scheme require mention. <u>First</u>, s 5-15 relevantly provides:

> (2) However, if luxury car tax has already become payable in respect of the car, the amount of luxury car tax payable on a *taxable supply of a luxury car is:
>
> (a) the amount of luxury car tax on the supply (worked out in accordance with subsection (1)); minus
>
> (b) the sum of all luxury car tax that was payable in respect of any previous *importation or supply of the car.
>
> The amount of luxury car tax payable on a taxable supply of a luxury car is zero if the amount in paragraph (a) is less than the amount in paragraph (b).

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> (3) In determining the luxury car tax that was payable in respect of any previous *importation or supply of a *car for the purposes of paragraph (2)(b), take into account *luxury car tax adjustments (if any) other than luxury car tax adjustments made under Subdivision 15-C (bad debts adjustments).

43. Those subsections: (1) recognise that LCT may become payable on multiple occasions in relation to the same car because of multiple supplies or importations and because of adjustments; and (2) prevent double taxation by reducing the amount of LCT otherwise payable by any amounts of LCT previously payable or adjustments that occurred.[18]

44. Secondly, s 13-10(2) provides for a four-year limit on adjustments:

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> A *luxury car tax adjustment must be made within 4 years after the supply or *importation to which the adjustment relates.

The correct construction of the LCTA provisions

45. The following [46] to [55] respond in particular to Notice of Appeal, [3].

46. For the above reasons, both the entitlement to quote in s 9-5(1) and the adjustment provisions in ss 15-30(1)(e), (3)(c) and 15-35(1)(e), (3)(c) apply a sole purpose test under which the imposition of or relief from LCT relevantly turns on whether a taxpayer intends to use or actually uses the car only for one of the quotable purposes set out in s 9-5(1). Any use of the car in addition to a quotable purpose means that the taxpayer is not entitled to quote (if the use is its intended use) and may be subject to an increasing

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adjustment (if the use is its actual use and LCT was avoided previously by quoting).

47. As to s 9-5(1), there can be no real doubt that that is the effect of that provision – its language is plain.

48. The Appellant's contention at AS [41] footnote 16 and AS [78] that the words "and for no other purpose" are included in s 9-5(1) to make clear that there are no other purposes for which a taxpayer may quote, beyond the three listed there, would render those words pointless and confusing – that there are no other purposes for which an entity may quote is abundantly clear from the list terminating at par. (c). Further, the Appellant's construction would frustrate the object of the LCTA, in that a dealer could quote even though they intended also to use the vehicle, for example, for private purposes outside

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the dealership's opening hours, which could not have been intended: PJ [74] (CAB 28);

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[18] In relation to importations, see s 7-10(3)(b), which prevents LCT being imposed at all on an importation if LCT has already become payable in respect of the relevant car (noting that there will then be no subsequent increasing adjustment in relation to the car because s 15-35(3)(b)(i) will not be satisfied).

see also PJ [69] (CAB 27).

49. The Appellant seeks to decouple s 9-5(1) from the adjustment provisions of Subdiv 15-B on the basis that once a taxpayer has quoted "the function of s 9-5 is spent" and its "residual" function is purely definitional, thus allowing the Appellant to jettison the telling words in the chapeau of s 9-5(1) from the construction exercise: AS [42]-[43], [50]-[54]. In Notice of Appeal, [3], the appellant calls s 9-5(1) "not an assessing or charging provision".

50. However, s 9-5(1) is a central provision. It applies as part of determining whether the supplier or importer must pay LCT on the relevant supply or importation. It does so on a final basis, unless the conditions for an adjustment arise. It is not a provision which is merely definitional nor is it set apart from the assessment process.

51. Further, s 9-5(1) serves a contextual function in construing the adjustment provisions of ss 15-30 and 15-35. In construing the LCTA holistically and harmoniously, as explained above at [38] to [40], ss 15-30 and 15-35 must be construed as applying a sole purpose test consistently with s 9-5(1). In addition to that being the natural meaning of the language used by those provisions, any other construction would contemplate a taxpayer avoiding LCT by quoting when it was not entitled to do so (deliberately or innocently) but there being no recouping of the LCT so avoided when the taxpayer actually used the car in a manner for which it would not have been entitled to quote.

52. Section 9-5(1) also supplies the criteria by which s 69-10(1)(b) of the GSTA operates to determine whether input tax credits are capped at the luxury car threshold amount. The LCTA should be construed with a view not only to internal consistency but also to consistency with the GSTA. The GST aspect is addressed further below at [65].

53. The Appellant focuses on ss 15-30(3)(c) and 15-35(3)(c), urging the interpretation of "a purpose other than a quotable purpose" as if it meant "a purpose alternative to a quotable purpose": AS [32], such that use for a quotable purpose and a non-quotable purpose does not trigger an increasing adjustment.

54. That interpretation is wrong as a matter of text. The subsections use the indefinite article, "a purpose"; they do not say "the purpose for which you used the car was not a quotable purpose" or "you did not use the car for a quotable purpose".

55. It is also wrong as a matter of context and purpose. As set out above, it would create inconsistency with the decreasing adjustment criteria in ss 15-30(1)(e) and 15-35(1)(e),

the quoting provision of s 9-5(1), and the GST provisions for luxury cars. It would flout the object of the adjustment provisions, which are designed to operate where "too much or too little luxury car tax was imposed": s 15-1. Where a supplier or importer incorrectly quoted pursuant to s 9-5(1), or later used the car for a non-quotable purpose not in contemplation at the time of the quote, the Appellant's construction would frustrate the statutory process for increasing the "too little" LCT to the correct level. The target of the legislation would be missed.[19] Legislation "should not be reduced to incoherence by judicial construction".[20]

56. The following [57] to [64] respond in particular to Notice of Appeal, [2], [4].

10 57. Much of the AS begins from the premise that the LCT is a "single stage, retail sales tax" and reasons that any construction that would see multiple taxing points, particularly those other than on retail sales, must be anathema to the legislative scheme: AS [32], [34], [36], [40], [49], [58]-[65].

58. As to that premise:

(a) That the LCT is a single stage tax (s 2-1) contrasts it with the simultaneously enacted GST which, as a multi-stage tax, has the distinguishing feature that it is imposed at each stage in the production process but with cascading tax prevented by a tax credit for businesses.[21] That description does not mean that there can never be two taxing points in relation to the one car under the LCT. In any event,
20 s 5-15(2), (3) makes clear that LCT can be imposed on multiple occasions by a succession of supplies, importations and/or adjustments, with a subtraction of the previously imposed LCT to avoid double taxation. Moreover, s 2-1, as a non-operative "explanatory section", cannot contradict the meaning of the language of the operative text: s 23-10; *Federal Commissioner of Taxation v Resource Capital Fund IV LP* (2019) 266 FCR 1 at [12].

(b) None of the operative provisions of the LCTA, the non-operative provisions of that Act or its extrinsic materials describe the LCT as a "retail sales tax". Each of ss 2-5(2) and 9-1 refer to the quotation system being "designed" to prevent

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[19] *Newcastle City Council v GIO General Ltd* [1997] HCA 53; 191 CLR 85 at 113; *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9; 253 CLR 531 at [60].
[20] *R v Independent Broad-Based Anti-Corruption Commissioner* [2016] HCA 8; (2016) 256 CLR 459 at 480 [76].
[21] *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553 at [10]-[13]; Graeme Cooper and Richard Vann, "Implementing the Goods and Services Tax" (1999) 21(3) *Sydney Law Review* 337 at 347.

tax from becoming payable until it is sold or imported at the retail level. That it is so "designed" reflects the reason for the implementation of the quotation system and the fact pattern to which it will usually apply, being one or more wholesale sales or importations preceding a conventional retail sale: see EM at [1.10] extracted above at [28]; see also EM at [1.2], [2.3], [5.8].

59. Once it is understood that the LCT is *generally* imposed only on one occasion and *generally*[22] on a retail sale, that it is *sometimes* imposed on a taxpayer in other circumstances (assuming "retail" has a certain and confined meaning) does not suggest a departure from the "policy or plan of the LCTA": c.f. AS [67]. Indeed, that a taxpayer
10 may quote to avoid LCT (ss 5-10(2)(a) and 9-5(1)), have an increasing LCT adjustment based on its actual use of the car (s 15-30(3)) and then make a subsequent taxable supply of that car (s 5-15(2)(b), (3)) is expressly contemplated by the scheme of the LCTA.

60. As to the Appellant's contention that the Respondent's construction raises the "possibility of double taxation" (see AS [46], [49]), there can be no double taxation. Section 5-15(2)(b), (3) prevents double taxation of an increasing LCT adjustment and LCT on a subsequent supply of the same car by reducing the amount of the LCT impost on the latter by that which was payable on the former. Thus, as intended, the latter impost of LCT is only referable to any increase in value of the car: EM at [2.65].

61. As to the Appellant's contention that the adjustment provisions in Subdivs 15-A and 15-
20 B must be read "so that they operate temporally" by reading in a two-year limitation period said to be consistent with s 5-10(2)(b) (AS [49]):

(a) The Appellant's premise that Subdiv 15-B "cannot be unlimited as to time" overlooks s 13-10(2) (extracted above at [44]), which provides an express four-year limit on adjustments.

(b) The Appellant offers no textual basis as to how such a two-year temporal limitation can be read into Subdiv 15-B, particularly in light of the different temporal limitation expressly adopted by Parliament. The Appellant's construction of ss 15-30(3)(c) and 15-35(3)(c) certainly provides no basis for such a limitation as, on its construction, a taxpayer who ceased to hold a car as
30 trading stock outside the two-year period would still be subject to an adjustment (c.f. AS [66]).

[22] EM [5.8]: "the luxury car tax will generally be levied at the point of retail sale."

(c) As to the Appellant's rhetorical policy question in AS [49], the quotation system gives a taxpayer the valuable benefit of relief from LCT at the time of the supply or importation, based on a statement of its intended future use of the vehicle, but its actual use may depart from that statement, either because it changes its mind or because the statement was incorrect. There is nothing surprising about Parliament providing for up to four years to recoup the LCT so relieved where a taxpayer in fact uses the car in a way inconsistent with its quote.

62. Once the legislative scheme of the LCTA is appreciated, it is apparent that an increasing adjustment prior to a retail sale does not depart from that scheme; it is expressly contemplated by it. *DFCT v Ellis & Clark Ltd* (1934) 52 CLR 85 and *Brayson Motors Pty Ltd v FCT* (1998) 156 CLR 651 do not assist the Appellant: c.f. AS [63]-[65].

63. In the LCTA, as with the GSTA, "as a matter of legal analysis what is taxed, that is to say what generates the tax liability"[23] is "important"[24] in construing the Act, more so than generalised descriptions of the tax. It is also important to avoid making a priori assumptions as to legislative policy.[25]

64. As to the examples given in AS [68], the LCT consequences would depend on all of the facts and circumstances in a given case: FC [100], [110] (CAB 72, 75). The use of a car not held as trading stock as a demonstrator was identified in the EM as a case that would not involve a quotable purpose: EM [2.86]; see also [3.32]; while in other cases, a demonstrator may be trading stock , in which case the nature of its use as trading stock and as a demonstrator , and use for any other purpose, would need to be examined. The attachment of a security interest to a car may or may not be a use of the car separate from its use for the purpose of being held as trading stock, depending on the facts.

The Appellant's GST argument

65. The Appellant makes submissions regarding s 69-10 of the GSTA at AS [76]-[78]. These are not supported by the grounds of appeal. Indeed, in its Notice of Appeal, [3] the Appellant turns away from s 9-5(1) of the LCTA, which supplies the criteria picked up in s 69-10(1)(b) of the GSTA. For completeness, however, the flaws in the

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[23] *Sterling Guardian Pty Ltd v Commissioner of Taxation* [2006] FCAFC 12; (2006) 149 FCR 255 at 258 [15], cited in *Commissioner of Taxation v Reliance Carpet Co Pty Limited* [2008] HCA 22 (2008) 236 CLR 342 at 346 [3].
[24] *Commissioner of Taxation v Reliance Carpet Co Pty Limited* [2008] HCA 22 (2008) 236 CLR 342 at 346 [3].
[25] *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 390 [26].

Appellant's GST arguments are addressed:

(a) The Appellant's primary argument at AS [78] is that the words "and for no other purpose" in the chapeau of s 9-5(1) should be read as "and for no other quotable purpose". However, that is plainly not what the provision says. Further, it would make the provision nonsensical. Section 9-5(1) is identifying quotable purposes. If a "quotable purpose" was carved out, circularity and confusion would ensue. If the Appellant means to submit that there is an entitlement to quote under s 9-5(1) where the relevant intention is for one of (a) to (c), but not two or more of (a) to (c), that would also lack sense. The items in (a) to (c) are not of their nature mutually exclusive; for example, a supplier may intend to use the car for holding it as trading stock (a) and for exporting it (c). See the last sentence of [14] above.

(b) The Appellant's argues alternatively at AS [78] that "and for no other purpose" should be read as "and for no other alternative purpose", by which it means no other purpose which is exclusive of or inconsistent with a quotable purpose. Again, this is just not what the words say. It would also render the words in the chapeau otiose – an entity cannot intend to use the car for one of the listed purposes if it intends to use the car for something that is, by hypothesis, inconsistent with that purpose. That is, the Appellant would construe the words "and for no other purpose" as being pointless – a negative limb that excludes anything inconsistent with the positive limb.

(c) Contrary to the last two sentences of AS [78], the reference to "other than holding it for hire or lease" in s 9-5(1)(a) applies to a taxpayer that holds a car in the ordinary course of its business for sale or exchange but also makes it available for hire or lease, such as where the taxpayer's business includes both sale and leasing of cars and the taxpayer does not definitively commit the car only to be for sale. A sale of such goods in the ordinary course of a business where they are available for sale or hire can be accurately described as a realisation of trading stock: *Memorex Pty Ltd v FCT* (1987) 19 ATR 553 at 558, 560.

The Appellant's alternative argument

66. The Appellant's alternative argument at AS [33], [70]-[75] that its use of the cars for the purposes of its Museum operations was "incidental or subservient to, or not inconsistent with" its use for the purposes of holding them as trading stock is not

supported by its grounds of appeal. It would also put a large gloss on ss 9-5(1) and the relevant provisions of Subdiv 15-B. Those provisions do not cover, expressly or impliedly, purposes which are incidental, subservient to or not inconsistent with the stated purpose. In any event, the overwhelmingly preferable view is that the Appellant's purpose of using the cars in its Museum was not merely part of its purpose of holding them as trading stock, or merely incidental or non-inconsistent. On the facts it was a use for a distinct and substantial additional purpose.

The framing of the enquiry

67. Once it is recognised that ss 9-5(1), 15-30(1)(e), (3)(c) and 15-35(1)(e), (3)(c) each provides for a sole purpose test (viz. "no other purpose", "only used the car for a quotable purpose", "use the car for a purpose other than a quotable purpose"), the relevant enquiry is whether the Appellant's use of the cars for the purposes of its Museum operations was a purpose other than the purpose of holding them as trading stock.

68. Framing the enquiry instead as whether the Museum use was "incidental or subservient to, or not inconsistent with" continuing use by a dealer of a vehicle as trading stock (AS [70]) a trading stock use suggests a rather more expansive enquiry than warranted by the language of the statute.

69. As both the Full Court (FC [108], CAB 74) and the primary judge observed (PJ [78], CAB 29), purpose is different from subjective motive. As Gleeson CJ stated in an oft-cited passage, "[t]he purpose of conduct is the end sought to be accomplished by the conduct. The motive for conduct is the reason for seeking that end".[26]

70. That the relevant enquiry is focussed on the taxpayer's use of the car and objective purpose, rather than the taxpayer's subjective motive for so using the car, is also confirmed by each of pars. (a) to (c) in s 9-5(1) being framed as a use of a car, in the sense of an activity or a particular form of commercial exploitation of the car, undertaken by the taxpayer, rather than a motive for the taxpayer so using the car.

71. As the Full Court observed (FC [110], CAB 75), the purpose or purposes for which the cars were used is ascertained by an objective consideration of the totality of the facts

[26] *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563 at [18]; see also *Commissioner of Taxation v Sharpcan Pty Ltd* (2019) 269 CLR 370 at [49] per Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ.

and circumstances.

72. Contrary to AS [71]-[74], the authorities to which the Appellant refers do not support glossing the LCTA as the Appellant seeks to do. Each concerned a markedly different context. This Court has previously identified that authorities concerning one form of statutory language mentioning exclusive use or application of a thing for a specified purpose are of limited utility in construing other provisions even if they use similar language: *FCT v Word Investments Ltd* (2008) 236 CLR 204 at [17]. In particular, this is true of an attempt to transplant authorities on the use of land across to statutes having different contexts and which deal with different assets. None of the authorities to which
10 the Appellant refers involved a regime like that of the LCTA with an initial test as to whether an entity intends to use a car for a quotable purpose "and for no other purpose" (s 9-5(1)) and then two subsequent tests, "you have only used the car for a quotable purpose" (ss 15-30(1)(e), 15-35(1)(e)) and "you use the car for a purpose other than a quotable purpose" (ss 15-30(3)(c), 15-35(3)(c)).

Significance and extent of Museum activity

73. The Appellant's public display of cars for reward in its Museum was a substantive economic activity seeing large numbers of visitors visit the Museum and thereby earning the Appellant substantial admission fees. It brought in a separate revenue stream and was targeted towards a customer base which was much larger than, and almost entirely
20 separate from, the customers of the car sales business.

74. The admission fees were $20 per adult, $12 per child and $55 per family.[27] The primary judge rejected Mr Denny's evidence that the Appellant charged the admission fees to discourage "tyre kickers" and that the Appellant raised the admission fees by $4 per adult to discourage people who were not potential buyers so as to encourage a more affluent clientele: PJ [80] (CAB 30); FC [102] (CAB 73).

75. During its first month of operation, the Museum had over 13,000 visitors.[28] It saw its 100,000th visitor in around June 2017, approximately a year after its opening.[29] In around November 2017, an entry count survey recorded that 412 visitors entered on a Friday and 1,329 visitors entered on a Saturday, with the Museum being open

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[27] FC [102] (CAB 73); PJ [27] (CAB 15); RFM at 45.
[28] PJ [2] (CAB 8); RFM at 39.
[29] FC [102] (CAB 73); PJ [2] (CAB 8); RFM Tab 15 (video).

Wednesday through Sunday and the weekend being the busiest days.[30] A Statement of Environmental Effects prepared for the Appellant recorded that the Museum received "up to 2,500 visitors per week".[31]

76. Against those visitor numbers, the Appellant received approximately 10 to 15 car sales enquiries per week.[32] Clearly, the vast majority of visitors to the Museum were individuals who did not have any genuine intention of purchasing one of the exhibits.

77. In its first full financial year of operation – the year ended 30 June 2017 – the Appellant received $1.32 million in admission fees from the Museum.[33] Those fees were substantial and not de minimis. During that same financial year, aside from some small
10 amounts of other miscellaneous income, the Appellant's total revenue was $29,569,359, meaning that its revenue from car sales was approximately $28,249,359. Against that, its cost of sales was $23,857,392, resulting in a gross profit on sale of cars of approximately $4,391,967 before the allocation of any overheads.[34] That is, before the allocation of overheads, the admission fees were equal in amount to approximately 30% of the gross profit from the sale of cars. The Appellant's overall profit for the 2017 financial year was $542,661,[35] for 2018 it was $71,677 (noting the Appellant received a $1.32m trust distribution that year)[36] and for 2019 it made a loss of $640,870.[37] To the extent that the car sales operations were profitable, the margin was only small, and not disproportionate to the results of the Museum operations.

20 78. As noted above at [8], it is not a fair characterisation of the evidence that admission fees did not cover costs, given the limited evidence as to the allocation of overheads.

The Museum as a tourist attraction

79. The Appellant marketed its Museum to the public at large, as a destination to visit. It did not only market itself to car enthusiasts, much less to the select group of individuals who may be likely to buy a luxury or vintage car from the Museum.

80. The Appellant marketed its Museum toward families with children. The Appellant

[30] RFM at 88, 91-92; PJ [43] (CAB 21); FC [109] (CAB 75).
[31] FC [103] (CAB 73).
[32] FC [109] (CAB 75); PJ [43] (CAB 21); RFM at 95.
[33] RFM at 96; PJ [44] (CAB 21).
[34] AFM at 26; PJ [44] (CAB 21).
[35] AFM at 17, 20.
[36] RFM at 16, 22.
[37] RFM at 103.

promoted its Museum as a destination for families during school holidays, and offered "family" tickets The Appellant posted on its Facebook page that its Museum was "school holiday fun" and invited viewers to "Bring the whole family, there's something for everyone!", accompanied by a picture of a smiling child in an exotically decorated vehicle.[38] Similarly, the Appellant promoted its Museum on its website as a destination to visit during the school holidays.[39] It offered "family" tickets (see above at [74]).

81. The Appellant held at its Museum a "Royal Favourites Exhibition" one Queen's Birthday weekend, to which it specifically invited "families", as well as car clubs and motor enthusiasts, to "visit and enjoy the collection".[40]

10 82. The Appellant promoted itself with several videos, including videos featuring interviews with children about their visits to the Museum,[41] from which it may be inferred that the Appellant sought to encourage parents to bring their children to the Museum as a family outing.

83. Consistently with the Museum operating as a tourist attraction, the Appellant operated a large merchandise and gift shop at the Museum[42] and there was also a café/diner present in the form of a 1963 or 1964 Airstream diner featuring a 1950s or 1960s style burger menu.[43]

84. On its website, the Appellant promoted its Museum as a "perfect venue for a day out"[44] and it suggested accommodation in the local Central Coast area.[45] It promoted its
20 Museum as "a break from the bustle of nearby Sydney".[46] The Appellant also promoted its Museum on the "visitcentralcoast.com.au" website, the by-line of which is "the fun starts here!".[47] Similarly, the Appellant permitted the "Sydney Weekender" television programme to produce a video promoting the Museum.[48]

85. The Appellant's website recounted, in relation to Mr Denny:[49]

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[38] RFM at 119; PJ [14] (CAB 12).
[39] RFM at 37, 38.
[40] PJ [28] (CAB 15-16); RFM at 121.
[41] RFM Tab 13 (video).
[42] FC [106] (CAB 74); PJ [83] (CAB 30); RFM Tab 13 (video) (see at 0:29.
[43] PJ [11], [83] (CAB 11, 30); FC [106] (CAB 74); RFM at 33; RFM at Tab 16 (video) (see at 4:21 to 4:48).
[44] RFM at 31, 34, 36.
[45] PJ [14] (CAB 12); RFM at 42.
[46] PJ [12] (CAB 12); RFM at 40, 41, 46.
[47] RFM at 35.
[48] RFM Tab 16 (video); PJ [2]-[3] (CAB 8).
[49] RFM at 43, 47, 50.

Tony decided to invest in his passion and create a museum so that others could appreciate the automotive world he loves so much.

86. Mr Denny drew parallels between the Appellant's Museum and the Australian Reptile Park, saying that just as the Australian Reptile Park had alligator feeding time, the Appellant's Museum was going to have "car feeding" twice a day.[50] This event was promoted in one of the Appellant's promotional videos.[51]

87. The Appellant expressly promoted its Museum to those who intended not to purchase a car, but just to admire the collection. It described the Museum as "Not just a museum, we're a car lover's dream" and encouraged all visitors, saying "Whether you're a collector, an enthusiast or just a car nut, Gosford Classic Car Museum is the place you want to be" and "guarantee[ing] an unforgettable experience".[52]

88. The public was encouraged to seek out Museum staff who were "more than happy to share" their "vast knowledge of automotive history" with visitors.[53]

89. In addition to employees of the Appellant, there were 10 volunteers who volunteered at the Appellant's Museum.[54] While the Appellant's evidence did not address these volunteers, it is objectively unlikely that the Appellant would have had volunteers operating as salespersons for it, from which it may be inferred that those volunteers were more likely present to share their enthusiasm for cars with visitors and so make the visitors' experiences more enjoyable: see also PJ [39], Q4, 5th dot point.

The Appellant's representation of its activities

90. The Appellant described its Museum operations as the "Gosford Classic Car Museum", and doing so was more than a mere business name; c.f. AS [22]. It used this name on large signage around the Museum[55] and in its promotional videos.[56] It also used this name and branding in the text and images throughout its website (gosfordclassiccarmuseum.com.au)[57] until, at some point during 2018, once the Commissioner's audit was well underway, it adopted a new website

[50] PJ [15] (CAB 12); RFM at 124.
[51] RFM Tab 13 (video) (see at 2:29 to 2:36).
[52] PJ [16] (CAB 12); RFM at 32.
[53] PJ [25] (CAB 15); RFM at 44.
[54] PJ [25] (CAB 15); RFM at 44.
[55] PJ Annexure A photo 1 (CAB 35); RFM at 59.
[56] RFM Tabs 13, 15 (videos).
[57] RFM at 31-34, 36-48.

(gosfordclassiccars.com.au) that omitted the word "museum",[58] except for a few references that remained.[59] On its earlier form of website, it also referred to itself as the largest car museum in the southern hemisphere,[60] which is similar to a description that Mr Denny volunteered that the Museum would "probably be in the top five car museums in volume in the world – definitely the biggest in Australia".[61]

91. In a Statement of Environmental Effects prepared on behalf of the Appellant for a proposed development of the Museum premises and submitted to council in 2017, the Museum was described as a "major attraction for the Central Coast" attracting visitors of all ages and backgrounds, with the "dominant existing use" of the premises being
10 "for the display of classic motor vehicles".[62]

Not all of the Appellant's cars were for sale

92. As noted above at [10], not all of the Appellant's cars displayed in its Museum were for sale. From the fact that some cars were displayed in the Museum despite not being for sale, it should be inferred that those cars were displayed in the Museum solely to attract visitors to the Museum and, further, that each of the cars in the Museum – including those that were for sale – was part of a unified exhibit of cars used and intended to be used to attract visitors to the Museum as a tourist attraction.

Part VII: Time required for oral argument

93. The Respondent estimates that he will require up to 4 hours if the Appellant is permitted
20 to expand its grounds of appeal to cover the alternative case summarised at AS [2(b)] and [2(c)] or, otherwise, up to 2.5 hours.

29 February 2024

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[58] RFM at 49-50.
[59] RFM at 49.
[60] RFM at 48; see also PJ [28], [38], [40] (CAB 16, 18, 20).
[61] RFM at 126.
[62] PJ [40] (CAB 20); RFM at 58.

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

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

- *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) Act 1999* (Cth) – historical version (effective from 10 March 2016 to 20 October 2016).
- *Sales Tax Assessment Act 1992* (Cth) – last in force version (effective from 22 June 2006 to 13 September 2006).
- *Sales Tax (Exemptions and Classifications) Act 1992* (Cth) - last version in force – (effective from 1 October 2001 to 13 September 2006).
- *Income Tax Assessment Act 1997* (Cth) – historical version (effective from 6 May 2016 to 29 June 2016).