FEDERAL COURT OF AUSTRALIA

Stallion (NSW) Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia [2019] FCA 1306

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| File number: | NSD 197 of 2018 |
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| Judge: | **THAWLEY J** |
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| Date of judgment: | 19 August 2019 |
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| Catchwords: | **TAXATION** – appeal against objection decisions deemed by s 14ZYA(3) to have been made by the Commissioner of Taxation under s 14ZY(1) of the *Taxation Administration Act* *1953* (Cth) – whether taxpayer was entitled to decreasing luxury car tax adjustments under the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) and input tax credits under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) – whether taxpayer acquired luxury cars as agent for principal – whether taxpayer on-sold luxury cars – whether ‘sham’ |
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| Legislation: | *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 7-1, 7-5, 7-15, 9-20, 11-5, 11-15, 11-20, 15-15, 17-5, 153-5(1), 195-1, Div 57, Subdivs 153-A, 153-B *A New Tax System (Goods and Services Tax) Bill 1998**A New Tax System (Luxury Car Tax) Act 1999* (Cth) ss 2-1, 2-5(2), 2-10(1), 2-10(2), 5-5, 5-10, 5-15(1), 5-15(2), 5-15 (3), 9-1, 9-5(1), 9-5(2), 13-5, 13-10, 13-15(2), 15-25, 15-30,23-10(1), 23-10(2), 25-1, 27-1 *Corporations Act 2001* (Cth) s 1305*Income Tax Assessment Act 1936* (Cth) Part IVA*Motor Dealers and Chattel Auctioneers Act* *2014* (Qld) s 73(1)*Motor Dealers and Repairers Act 2013* (NSW) *Taxation Administration Act 1953* (Cth) ss 14ZYA(3), 14ZY(1), 14ZZO(b)  |
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| Cases cited: | *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1*Bateman Television Ltd (in liq) v Bateman and Thomas* [1971] NZLR 453*Blatch v Archer* (1774) 1 Cowp 63*Calverley v Green* (1984) 155 CLR 242*Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466*Crown Estates (Sales) Pty Ltd v Commissioner of Taxation* [2015] AATA 949*Crown Estates (Sales) Pty Ltd v Commissioner of Taxation* [2016] FCA 335*Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471*Fabry v Commissioner of Taxation* 2001 ATC 4,697*Federal Commissioner of Taxation v Suttons Motors (Chullora) Wholesale Pty Ltd* (1985) 157 CLR 277*Freeman & Lockyer v Buckhurst Park Properties (Magnal) Ltd* [1964] 2 QB 480*Georges v Seaborn International (Trustee), in the matter of Sonray Capital Markets Pty Ltd* (in liq) [2012] FCA 75*Hadjiloucas v Crean* [1988] 1 WLR 1006*Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361*Melbourne Car Shop Pty Ltd v Federal Commissioner of Taxation* [2010] FCA 373*Millar v Commissioner of Taxation* (2016) 243 FCR 302*Milliman v Rochester Ry Co* 3 App Div 109; 39 NYS 274 (1896)*Ong v Lottwo Pty Ltd (in liq)* [2013] SASCFC 57*Peterson v Moloney* (1951) 84 CLR 91*Raftland Pty Ltd v Commissioner of Taxation* (2008) 238 CLR 516*Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243*Saga Holidays Ltd v Commissioner of Taxation* (2006) 156 FCR 256*Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 |
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| Date of hearing: | 29 and 30 April 2019, 1 May 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Taxation |
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| Category: | Catchwords |
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| **Table of Corrections** |  |
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| 21 August 2019 | In paragraph 246, subparagraph (2) should read “LCT was payable because Stallion did not quote”. |

ORDERS

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|  | NSD 197 of 2018 |
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| BETWEEN: | STALLION (NSW) PTY LTD (ACN 614 422 061)Applicant |
| AND: | COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIARespondent |

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| JUDGE: | THAWLEY J |
| DATE OF ORDER: | 19 AUGUST 2019 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. Unless either party applies within 7 days for a different order in relation to costs, the applicant pay the respondent’s costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THAWLEY J:

# Overview

1. The applicant (**Stallion**) appealed against objection decisions deemed by s 14ZYA(3) to have been made under s 14ZY(1) of the *Taxation Administration Act* *1953* (Cth) (**TAA**) disallowing objections to amended assessments and assessments of shortfall penalty for the tax periods November 2016, December 2016 and January 2017.
2. The amended assessments disallowed input tax credits under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) and luxury car tax (**LCT**)adjustments under the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) (**LCT Act**).
3. Credits and adjustments had been claimed by Stallion in relation to nine luxury cars, purchased between November 2016 and February 2017. The capacity in which Stallion purchased the luxury cars was one of the principal issues in dispute:
* Stallion’s case was that, in the course of its business, it purchased each luxury car from a dealer and then on-sold each car to CJS Group Sydney Pty Ltd (**CJS**). Stallion paid LCT and goods and services tax (**GST**) on each purchase. It submitted that it then appropriately claimed input tax credits and decreasing LCT adjustments, in substance recouping the LCT and GST paid on each purchase.
* The **Commissioner** of Taxation’s case was that Stallion was not entitled to claim input tax credits or decreasing LCT adjustments because:
	1. Stallion purchased each of the nine luxury cars as an agent for CJS. Although Stallion was named as the purchaser in the contracts entered into with the relevant dealers, Stallion was in fact acting as CJS’s agent in those transactions, albeit this may not have been known to the dealers in some or all of the transactions.
	2. Alternatively – if the cars were purchased by Stallion in its own right and not as agent for CJS – then Stallion held the cars as trustee for CJS to the extent that CJS funded the purchase price.
1. It was critical to Stallion’s case that there was in fact a sale of the luxury cars by Stallion to CJS. There were no written contracts of sale between Stallion and CJS. The only documents generated in relation to each asserted sale transaction between Stallion and CJS were:
2. “ABN Quotations” issued by CJS to Stallion (the concept of “quoting” under the LCT Act is referred to at [13(2)] and [21] to [23] below); and
3. tax invoices issued by Stallion to CJS.
4. In addition to contending that Stallion purchased the luxury cars as CJS’s agent, the Commissioner contended that there were no real sales between Stallion and CJS and that the tax invoices and “ABN Quotations” were a “sham” in the sense that they were created to give the appearance of a genuine sale when, in fact, the arrangements were otherwise. Although the Commissioner advanced a case of “sham”, Stallion put forward no evidence that there was any negotiation as to the price included in Stallion’s tax invoices to CJS or otherwise as to the terms of the purported on-sale of the luxury cars to CJS.
5. For the reasons more fully explained below, I conclude that Stallion:
6. only entered into the nine purchase transactions with the relevant dealers if instructed to do so by CJS and for an amount approved by CJS;
7. issued tax invoices for the luxury cars purportedly sold to CJS in amounts as directed by CJS.
8. As explained below, I am not satisfied that:
9. Stallion did not acquire the luxury cars as CJS’s agent;
10. there was genuine on-sale of the luxury cars to CJS;
11. Stallion’s activities were such that it was entitled to claim decreasing LCT adjustments or input tax credits.
12. Stallion has therefore failed to establish that the amended assessments are excessive.
13. In closing submissions, Stallion conceded that, if the Part IVC appeal in relation to the amended assessments was dismissed, then the penalty assessments were correct and there was no error in the Commissioner’s decision not to remit penalties. It follows that it is unnecessary to address penalties.
14. The appeal must therefore be dismissed with costs.
15. It is helpful to understand the relevant statutory framework before turning to the facts.

# STATUTORY FRAMEWORK

## Luxury Car Tax

### Statutory overview

1. Division 2 of Pt 1 of the LCT Act is entitled “Overview of the luxury car tax legislation”. Each “explanatory section” in Div 2 forms part of the LCT Act but is not an “operative provision”: s 23-10(1)(b) and 23-10(2). An “explanatory section” may only be considered for the limited purposes set out in s 23-10(2), which includes determining the object or purpose of operative provisions.
2. Division 2 explains that:
3. Section 2-1: The LCT 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”.
4. Section 2-5(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.” By way of practical explanation, a second luxury car dealer (B) purchasing a luxury car from a first luxury car dealer (A) to hold it as trading stock is entitled to “quote” their ABN to A with the result that A would not charge LCT to B because A would not make a taxable supply (and thus incurs no liability for LCT) if the “recipient” (B) “quotes” for the supply.
5. Section 2-10(1): Amounts of LCT are included in the “net amounts” under the GST system, having the “effect of incorporating the luxury car tax into the payments and refunds system for the GST”.
6. Section 2-10(2): Certain “adjustments” to the “net amount” can arise out of circumstances that occur after the supply of a car.

### Liability for LCT

1. Section 5-5 provides:

**5‑5 Liability for luxury car tax**

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

1. A “luxury car” is a “car” whose “luxury car tax value” exceeds the “luxury car tax threshold”: s 25-1; s 27-1.
2. Section 5-10 provides:

**5‑10 Taxable supplies of luxury cars**

(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; and

(d) you are \*registered, or \*required to be registered.

(2) However, 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.

1. Section 5-10(2)(a) is the operative provision which makes it clear that a “taxable supply of a luxury car” is not made if the “recipient quotes” for the supply. Section 27-1 includes the following definitions:

***quote*** means quote an \*ABN.

***recipient***, in relation to a supply, means the \*entity to which the supply was made.

### Calculation of LCT

1. The amount of LCT payable is determined under s 5-15(1) of the LCT Act. The precise quantification of the LCT amount is not presently relevant and it is therefore not necessary to set out the detail of the calculation to be undertaken.
2. It is relevant to note s 5-15(2) and (3), which provide:

**5‑15 The amount of luxury car tax payable**

...

(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).

(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).

1. The Commissioner put forward the position that s 5-15(2)(b) was limited to requiring subtraction only of the LCT payable in respect of the immediately preceding supply. This position is obviously wrong. It cannot be reconciled with the word “any” in s 5-15(2)(b) or with s 5-15(3).

### Quoting

1. Division 9 of Pt 2 of the LCT Act is entitled “Quoting”. Section 9-1 is an “explanatory provision” and, accordingly, not an operative provision: s 23-10(1)(a) and 23-10(2). Section 9-1 provides:

**9‑1 What this Division is about**

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.

1. Sections 9-5(1)(a) and (2) (which are operative provisions) provide:

**9-5 Quoting**

(1)   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, and for no other purpose:

(a)   holding the car as trading stock, other than holding it for hire or lease; or …

(2)   However, you are not entitled to \*quote unless you are \*registered.

1. “Registered” means registered under Pt 2-5 of the GST Act: s 27-1 of the LCT Act.

### Decreasing adjustments

1. Stallion claimed that “decreasing luxury car tax adjustments” arose. Section 27-1 defines “decreasing luxury car tax adjustment” as having the “meaning given by sections 15-25, 15-30, 15-35 and 15-40”. Of present relevance are s 15-25 and s 15-30 which include:

**15-25 Decreasing adjustments for supplies**

If the \*corrected luxury car tax amount is *less* than the \*previously attributed luxury car tax amount, you have a ***decreasing luxury car tax adjustment*** equal to the difference between the previously attributed luxury car tax amount and the corrected luxury car tax amount.

…

**15-30 Changes of use—supplies of luxury cars**

1. 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

(c) you were \*registered at the time of the supply; and

(d) you intend to use the car for a \*quotable purpose; and

(e) you have only used the car for a quotable purpose.

…

(2) The \*decreasing luxury car tax adjustment is equal to the amount of luxury car tax that was payable on the supply.

### Paying LCT

1. Division 13 of Pt 3 of the LCT Act is entitled “paying the luxury car tax”. Of present relevance, it provides that a decreasing LCT adjustment is taken into account in determining the “net amount” that an entity must pay the Commonwealth or that is to be refunded by the Commonwealth as contemplated by the GST Act: s 13-10.
2. Division 13 includes:

**13-5 Net amounts increased by amounts of luxury car tax**

Your \*net amount for a \*tax period is increased by the sum of all of the amounts of luxury car tax (if any) that are attributable to that tax period, other than amounts on \*taxable importations of luxury cars.

**13-10 Adjustments**

(1) If you have any \*luxury car tax adjustments that are attributable to a \*tax period applying to you, alter your \*net amount for the period as follows:

(a) add to that net amount for the period the sum of all the \*increasing luxury car tax adjustments (if any) that are attributable to the period;

(b) subtract from that net amount the sum of all the \*decreasing luxury car tax adjustments (if any) that are attributable to the period.

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

1. Section 13-15(2) provides that luxury car tax adjustments (defined in s 27-1 to include “decreasing luxury car tax adjustments”) are attributable to the same tax period(s) to which they would be attributable if they were an “adjustment” for GST purposes.

## GST

1. Under the GST Act, GST is payable on taxable supplies and an entitlement to an input tax credit arises on creditable acquisitions: s 7-1 and s 11-20.
2. The term “creditable acquisition” is defined in s 11-5:

**11‑5  What is a creditable acquisition?**

You make a ***creditable acquisition*** if:

(a) you acquire anything solely or partly for a \*creditable purpose; and

(b) the supply of the thing to you is a \*taxable supply; and

(c) you provide, or are liable to provide, \*consideration for the supply; and

(d) you are \*registered, or \*required to be registered.

1. The phrase “creditable purpose” is defined in s 11-15:

**11‑15 Meaning of *creditable purpose***

(1) You acquire a thing for a ***creditable purpose*** to the extent that you acquire it in \*carrying on your \*enterprise.

1. Section 9-20 provides the meaning of “enterprise”:

**9‑20 Enterprises**

(1) An ***enterprise*** is an activity, or series of activities, done:

(a) in the form of a \*business; or

(b) in the form of an adventure or concern in the nature of trade; or

…

1. Section 195-1 of the GST Act provides that, except so far as the contrary intention appears, a “***business*** includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee”.
2. Amounts of GST and input tax credits are set off against each other to produce a “net amount” that the entity must pay to the Commonwealth, or the Commonwealth must refund to the entity: s 7-5 and s 7-15. As mentioned above and as is recorded in Note 2 to s 17-5(2) extracted immediately below, LCT adjustments are taken into account in the “net amount”.
3. The “net amount” of GST is calculated by reference to s 17-5 of the GST Act.

**17**-**5 Net amounts**

(1) The ***net amount*** for a tax period applying to you is worked out using the following formula:

GST – Input tax credits

where:

***GST*** is the sum of all of the GST for which you are liable on the \*taxable supplies that are attributable to the tax period.

***input tax credits*** is the sum of all of the input tax credits to which you are entitled for the \*creditable acquisitions and \*creditable importations that are attributable to the tax period.

Note 1: For the basic rules on what is attributable to a particular period, see Division 29.

Note 2: For further rules if you have excess GST for the period, see Division 142.

(2) However, the \*net amount for the tax period:

(a) may be increased or decreased if you have any \*adjustments for the tax period; and

(b) may be increased or decreased under Subdivision 21-A of the \*Wine Tax Act; and

(c) may be increased or decreased under Subdivision 13‑A of the *A New Tax System (Luxury Car Tax) Act 1999*.

Note 1: Under Subdivision 21‑A of the Wine Tax Act, amounts of wine tax increase the net amount, and amounts of wine tax credits reduce the net amount

Note 2: Under Subdivision 13‑A of the *A New Tax System (Luxury Car Tax) Act 1999*, amounts of luxury car tax increase the net amount, and luxury car tax adjustments alter the net amount.

# THE FACTS

1. Stallion was incorporated on 24 August 2016. It was registered for GST on the same day. The sole director and shareholder of Stallion was Raimon (**Rai**) Moussa. Since 1999, the year after he finished year 12, he had worked in a printing business with his brother, Fadel (**Fred**) Moussa. Stallion’s registered office was “**F12** 101 Rookwood Road Yagoona NSW”, which was also the premises from where the printing business operated. Both Rai and Fred gave evidence in the proceedings.
2. When Stallion was incorporated, Rai had no experience in relation to the luxury car industry. In his first affidavit, Rai gave evidence that, in mid-2016, he wanted another source of income and had been thinking about starting to sell cars, like his family friend of over 18 years, Mr Simon Wakim.
3. Mr Wakim was a car salesman for a company called **CJS** Group Pty Ltd, trading as “EuroMarque Sydney”. The shares in CJS were wholly owned by Mr Wakim’s wife, Ms Anna Wakim. Mr Wakim was a director and company secretary of CJS from 10 November 2017.
4. On 5 September 2016, Rai signed an “Application for a Licence” issued by NSW Fair Trading under the *Motor Dealers and Repairers Act 2013* (NSW). The application was for a motor vehicle dealer’s licence for Stallion for a term of one year. The application form stated that Stallion proposed to “sell motor vehicles on consignment” and that Stallion had sufficient financial resources to meet its liabilities with respect to any business to be carried on by authority of the licence (being a requirement of the licence and without which the licence would not be granted). At that time of applying for the licence, Stallion had not opened a bank account.
5. Stallion was granted a motor vehicle dealer’s licence on 7 October 2016.
6. Neither Rai nor Stallion sought any advice from any business advisor either before or after Stallion commenced its activities. Rai did have discussions with Mr Wakim in regard to starting a business, accountancy, licensing and “police books”. Mr Wakim was not called to give evidence. He sat next to Rai for substantial parts of the hearing.
7. Stallion was registered on the instructions of Rai by his accountant, Hafez Alameddine. Mr Alameddine agreed to prepare business activity statements for Stallion and to lodge its income tax returns. Mr Alameddine prepared the November 2016 business activity statement and Mr Michael of Sydney Tax and Superannuation prepared the December 2016 and the January 2017 business activity statements. Neither person was called to give evidence.
8. Stallion did not hold any insurance in respect of its activities. Rai gave an account of a conversation he had with an insurance broker in which he stated that Stallion would not initially store cars. He had decided to arrange for Stallion’s customers to collect the cars immediately after purchase or to deliver them directly to Stallion’s customers. He stated to the insurance broker:

I’m just starting off and planning on buying cars on behalf of customers and making a commission per sale. I’ll be sourcing the cars, and buying them as needed, with my customer’s funds.

1. Stallion did not in fact ever store any vehicle at F12 or at any other location. The only entity to which Stallion ever purportedly sold a vehicle was CJS.
2. Stallion set up a “police book” through EasyCars which provides on-line motor vehicle dealer management software. Rai was not provided with any training by EasyCars, but understood from discussions with an EasyCars representative and Ms Wakim that he needed to log information in respect of any purchases or sales on the EasyCars police book database.
3. Stallion opened a bank account with St George in October 2016.

## The luxury cars purchased

1. From November 2016 to January 2017, Stallion was involved in the purchase of nine luxury cars:
2. **Aston Martin** Vanquish Coupe MV16;
3. **Mercedes** Benz **S-Class** S350d Saloon;
4. Mercedes Benz GLE 63 S 4Matic Coupe (VIN 1475);
5. Mercedes Benz GLE 63 S 4Matic Coupe (VIN 9742);
6. **Ferrari** F152 **F12** Berlinetta;
7. **Mercedes** Benz **M-AMG** CLA45 4M FL;
8. **Rolls-Royce** Wraith;
9. **Porsche Cayenne GTS (VIN 1710)**; and
10. **Porsche Cayenne GTS (VIN 1608)** Series 2 MY16.
11. In his first affidavit, Rai stated that “Stallion’s process in selling cars generally followed a standard procedure”. He gave the Aston Martin as one example of a purchase which followed the “standard procedure”.
12. There were two cars which were said not to follow the standard procedure: the Ferrari F12 and the Mercedes S-Class. Rai’s explanation as to why these vehicles represented an exception to the “standard procedure” was as follows:
13. as to the Ferrari F12: it was Mr Wakim who directly agreed the price with the dealer; and
14. as to the Mercedes S-Class: the dealer (from whom the two Mercedes GLEs had been purchased) contacted Stallion and Rai then contacted CJS to see if CJS was interested in purchasing the cars. The car was only acquired once Mr Wakim had indicated CJS wanted to purchase it.
15. It is not necessary to set out the detailed facts in relation to each of the nine transactions. It is sufficient to explain the reasons for my conclusions by providing a detailed account of three of the transactions: the Aston Martin and the Porsche Cayenne GTS (VIN 1710) (vehicles in respect of which the “standard procedure” was said to apply); and the Ferrari F12 (a car said to be one of the two exceptions to the “standard procedure”). The critical dealings and the nature of the relationship between Stallion and CJS are sufficiently exposed by a detailed account of those transactions. The ultimate conclusions I draw in respect of the transactions concerning those three luxury cars apply to the remaining vehicles. There was nothing about the remaining transactions which gave rise to any different result. I have referred to aspects of the remaining transactions in a more limited way.
16. Before turning to the detail of the three transactions, it is convenient to address four general topics, relevant and applicable to all nine transactions:
17. Stallion purchased the luxury cars on a “retail” basis, without “quoting”;
18. Stallion only purchased the luxury cars for an amount CJS approved;
19. there was no negotiation of the price of the purported sale by Stallion to CJS; and
20. CJS did not make any relevant loans to Stallion.

## Stallion purchased the luxury cars on a “retail” basis, without “quoting”

1. Each of the nine luxury cars was purchased from the relevant dealer without Stallion “quoting” for the purchase. This meant that Stallion was charged LCT by the dealer, notwithstanding that, on its case, Stallion was in fact purchasing the cars wholesale for immediate on-sale to CJS.
2. It is perhaps useful to give a practical example of what might otherwise occur. If a second luxury car dealer (B (Stallion)) purchased from a first dealer (A) in order to hold the car as trading stock or on-sell it to a third dealer (C (CJS)), B could “quote” to A. Where B “quotes” to A, A does not make a “taxable supply of a luxury car”: s 5-10(2)(a) of the LCT Act. Accordingly, A does not incur a liability for LCT to on-charge to B. This process would avoid the administrative and financial inconvenience of B paying LCT to A at the time of B’s acquisition and B later seeking to recoup that LCT through an LCT adjustment.
3. Continuing with the above example, if C (CJS) quoted to B (Stallion), B would not make a taxable supply to C and C would not be charged LCT by B. B would only make a taxable supply if it supplied to an entity which did not “quote”. This process would result in LCT first becoming payable by the entity (or person) purchasing at the “retail” level from C. This would be consistent, as s 2-5(2) of the LCT Act makes clear, with the way in which the statutory scheme was intended to operate – see: [13(2)] above.
4. Stallion’s activities involved it being the named party to contracts pursuant to which LCT was payable in respect of what were often described as sales at a “retail” price level. The failure of Stallion to quote, or its purchase of the cars on a “retail” basis, meant that Stallion had to pay LCT and then later seek to recoup that LCT through a decreasing LCT adjustment. There was no good explanation provided as to why Stallion would adopt such an approach when it claimed to be purchasing the cars as a dealer to on-sell them immediately to CJS. A limited explanation was attempted, referred to at [95] below.
5. For the reasons given at [95] below, I conclude that it was because Stallion was instructed to do so by CJS that Stallion did not “quote” and that it purchased each of the nine luxury cars on terms which included a charge for the LCT payable by the dealer on the dealer’s supply.

## The decision to purchase from the original dealer

1. The decision to enter into the purchase transactions in respect of the nine luxury cars was the decision of CJS. Whilst Stallion sourced the luxury cars and was involved in the negotiation of the final price, I conclude that Stallion only executed the purchase contracts with the relevant dealers at the direction and with the approval of CJS.
2. The price which Stallion should seek to negotiate with the various dealers was identified by CJS at the outset. Whether the contracts could be entered into at the price ultimately negotiated was decided by CJS. This is particularly significant in circumstances where Stallion did not negotiate the amount it should put in the tax invoices issued by Stallion to CJS in respect of the purported on-sale of the luxury cars to CJS – see: [61] to [72] below.
3. In this context, there was evidence that Stallion sent to CJS the tax invoice for $170,000 that Stallion had received from a Mercedes Benz dealer (Star Auto (Australia) Pty Ltd) for the Mercedes Benz S-Class on 22 December 2016 before settlement. Stallion’s tax invoice to CJS in an amount of $149,000 was dated 20 December 2016. I infer that the dealer’s tax invoice was sent by Stallion to CJS in connection with obtaining CJS’s instructions to enter into the purchase transaction and pay the dealer.
4. As noted earlier, in the context of describing Stallion’s proposed activities to an insurance broker, Rai stated:

I’m just starting off and planning on buying cars on behalf of customers and making a commission per sale. I’ll be sourcing the cars and buying them as needed, with my customer’s funds.

1. He also stated in his first affidavit that the agreed arrangement involved Stallion “sourcing cars for [CJS] initially”.

## There was no negotiation of the price of the purported sale by Stallion to CJS

1. Stallion asserted it purchased the luxury cars to on-sell to CJS. It relied upon tax invoices it issued to CJS in respect of each of the nine luxury cars. Those invoices recorded a charge for GST and no charge for LCT. CJS issued “ABN Quotations”, that is “quoted”, in relation to Stallion’s purported sales, albeit not necessarily contemporaneously.
2. Rai gave no evidence of any negotiation of a sale price between Stallion and CJS. Not one example was suggested of a situation in which the price between Stallion and CJS was the subject of any bargaining whatsoever. Rai gave no reliable or persuasive evidence of how the amounts in Stallion’s invoices were determined as between Stallion and CJS.
3. In *Commercial Union Assurance Co of Australia Ltd v* ***Ferrcom*** *Pty Ltd* (1991) 22 NSWLR 389 at 418F to 419G, Handley JA applied the statement of Follett J in *Milliman v Rochester Ry Co* 3 App Div 109; 39 NYS 274 (1896) at 276:

… I think the omission to interrogate a friendly witness in respect to facts presumably within his knowledge is more significant than the failure to call such a person as a witness, and that the presumption that the testimony would not have been favourable to the party’s case is stronger than the one which arises from the failure to produce such a person as a witness.

1. Handley JA noted that a failure to examine in chief on an issue might give rise to the inference that there was “fear” to do so. He stated: “This fear is then ‘some evidence’ that such examination in chief ‘would have exposed facts unfavourable to the party’”. These observations were referred to with apparent approval in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at [230] (Weinberg, Bennett and Rares JJ).
2. In *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [63], Heydon, Crennan and Bell JJ observed:

The rule in *Jones v Dunkel* (58) is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party’s case. That is particularly so where it is the party which is the uncalled witness (59). The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn (60). These principles have been extended from instances where a witness has not been called at all to instances where a witness has been called but not questioned on particular topics. Where counsel for a party has refrained from asking a witness whom that party has called particular questions on an issue, the court will be less likely to draw inferences favourable to that party from other evidence in relation to that issue (61).

1. Footnote 61 was in these terms:

*Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419. Handley JA stated some stronger propositions in those passages, but what he said is at least authority for what is stated above.

1. It is not necessary in this case to employ the stronger form of reasoning referred to by Handley JA in *Ferrcom*. On the other hand, it is important to recognise that the significance of a failure to adduce evidence in chief from a witness called by a party varies according to the particular circumstances of the case. For example, the failure might be regarded as particularly significant if the topic was one directly within the witness’s knowledge and of great importance to the case being advanced by the party. That is the present situation. It is also relevant to recognise that the failure falls to be considered having regard to the general principle that the evidence as a whole is to be weighed having regard to the capacity of the respective parties to adduce evidence on the topic: *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970. Here, whether there was any negotiation was peculiarly within the knowledge of Stallion and CJS.
2. It was not contentious that there was no evidence that there was any negotiation of the amounts included in any of the tax invoices relied upon by Stallion as evidencing genuine sale transactions between Stallion and CJS:
3. Stallion did not give any such evidence. Rai gave no evidence of any negotiation notwithstanding the lack of negotiation was emphasised in opening submissions before the hearing commenced, as was the proposition that the tax invoices were a “sham”.
4. CJS did not give evidence of any negotiation.
5. Despite the production of numerous documents by Stallion and CJS, not one of them suggested there was the slightest negotiation.
6. I conclude that there were no negotiations between CJS and Stallion in relation to a sale of any of the nine luxury cars by Stallion to CJS.
7. One theme of Rai’s evidence, albeit not on this particular topic, was that he was learning from Mr and Ms Wakim what to do because trading in cars was new to him. By way of example, in relation to Stallion’s “police book”, when asked why he entered certain details in relation to the Aston Martin, Rai stated he was “still learning everything” and doing what he had been “told” and “instructed” and “taught”. In context, this was a reference to what he had been instructed by Mr and Ms Wakim.
8. If Stallion had purchased the luxury cars on its own account for genuine on-sale to CJS it might be expected to have paid close attention to the amounts for which it purchased and then on-sold the vehicles. Stallion’s profit would be maximised by paying as little as possible to the dealer and selling to CJS at the highest price it could. However, Stallion purchased the cars for the amount which CJS required and approved and then purported to on-sell to CJS without negotiation of the purported sale price.
9. Having regard to the lack of any negotiation of the amount to be included in the tax invoices issued to CJS by Stallion, and the circumstances referred to above and later in these reasons, I conclude that CJS (by either Mr or Ms Wakim) told Stallion (through Rai) the price which Stallion should record in the invoices issued by Stallion to CJS and that Stallion issued those tax invoices in the amounts as directed.

## CJS did not make any relevant loans to Stallion

1. Rai asserted that some of the payments recorded in Stallion’s bank statements as having been received from CJS represented loans made by CJS. One aspect of the Commissioner’s case was that the entirety, alternatively nearly the entirety, of the purchase price of each of the luxury cars was funded by CJS. If in fact some of the funds transferred to Stallion from CJS were loans, then this aspect of the Commissioner’s case might not have been made out and Stallion’s case that it was engaged in its own enterprise of buying and selling luxury cars might have been stronger.
2. There was no person called from CJS to give direct evidence that it made loans to Stallion. This may have been explained by the fact that CJS had its own dispute with, and litigation against, the Commissioner. I do not employ the reasoning in *Jones v Dunkel* in relation to the absence of evidence from CJS.
3. Stallion did not provide any security for any purported loan from CJS. There were no financial statements or business records of Stallion that referred to any loans or recorded any interest expenses for any loans from CJS.
4. However, Stallion tendered amended financial statements of CJS for the period 1 July 2016 to 31 December 2016 and for the year ended 30 June 2017 which had been produced on 18 December 2018 in answer to a subpoena: Exhibit A2. These showed:
5. 1 July 2016 to 31 December 2016: a loan to Stallion of $80,000; and
6. Year ended 30 June 2017: a loan to Stallion of $126,100.
7. Stallion also tendered (Exhibit A3) a CJS document, produced on 18 December 2018 in answer to the subpoena, entitled “Loan – Stallion Transactions” which identified six loan transactions between 2 November 2016 and 24 January 2017 as follows:

|  |
| --- |
| **Loan – Stallion Transactions** |
| **CJS Group Sydney Pty Ltd** |
| **For the period 24 August 2016 to 31 March 2017** |
| **DATE** | **SOURCE** | **DESCRIPTION** | **REFERENCE** | **DEBIT** | **CREDIT** | **RUNNING BALANCE** | **GROSS** | **GST** |
| **Loan - Stallion** |
| **Opening Balance** | - | - | - | - | - |
| 2 Nov 2016 | Spend Money | F&F - Stallion |  | 10,000.00 | - | 10,000.00 | 10,000.00 | - |
| 3 Nov 2016 | Spend Money | F&F - Stallion |  | 10,000.00 | - | 20,000.00 | 10,000.00 | - |
| 9 Dec 2016 | Spend Money | F&F - Stallion |  | 30,000.00 | - | 50,000.00 | 30,000.00 | - |
| 22 Dec 2016 | Spend Money | Cash Drawer - Stallion |  | 30,000.00 | - | 80,000.00 | 30,000.00 | - |
| 20 Jan 2017 | Spend Money | STALLION NSW PTY LTD - Loan |  | 21,000.00 | - | 101,000.00 | 21,000.00 | - |
| 24 Jan 2017 | Spend Money | F&F - Stallion |  | 25,100.00 | - | 126,100.00 | 25,100.00 | - |
| Total Loan - Stallion | 126,100.00 | - | 126,100.00 | 126,100.00 | - |
| Closing Balance | 126,100.00 | - | 126,100.00 | - | - |

1. Exhibit A3 was expressed to be “For the period 24 August 2016 to 31 March 2017”. The subpoena had called for production, inter alia, of documents for the period 24 August 2016 to 31 March 2017. I infer that Exhibit A3 was created for the purpose of being produced in answer to the subpoena as opposed to it being a document already existing in the records of CJS at the time the subpoena was served.
2. The amended financial statements and the summary of loans were relied upon by Stallion in closing submissions as evidencing the existence of loans from CJS to Stallion.
3. In response, the Commissioner pointed out that CJS had, on 22 August 2018 and pursuant to the same subpoena, already produced (unamended) financial statements for the same periods as the amended financial statements. The unamended financial statements did not record the existence of any loans to Stallion. No explanation was provided as to how or why the amended financial statements came to be prepared or who was responsible for preparing them or who instructed that they be prepared.
4. A comparison of the financial statements with the amended financial statements reveals that:
5. the loans to Stallion which appeared in the amended financial statements had been added as “receivables”; and
6. loans to directors of CJS were increased under “non-current liabilities” in the amended financial statements by the same amount as the loans to Stallion,

such that the “net asset position” of CJS remained the same in the amended financial statements produced on 18 December 2018 as had been recorded in the (unamended) financial statements produced on 22 August 2018.

1. Section 1305 of the ***Corporations Act*** *2001* (Cth) provides:

**1305 Admissibility of books in evidence**

(1)  A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.

(2)  A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).

1. Whilst it may be accepted that, by reason of s 1305 of the *Corporations Act*, the amended financial statements (Exhibit A2) are prima facie evidence that CJS made loans to Stallion, I am not satisfied that CJS in fact did make loans to Stallion in light of the circumstances just described – see: *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1 at [394] – [398], [400] (Austin J). I would reach the same conclusion with respect to Exhibit A3, if it could properly be regarded as a “book kept by a body corporate under a requirement of this Act”.
2. In reaching the conclusion that CJS did not make loans to Stallion, I take into account that there were no financial statements or other business record of Stallion which referred to any loans from CJS and that there was no suggestion of any payment of interest or repayment of principal. I have also taken into account the facts referred to at [207] to [210] below.
3. I turn to the detailed facts concerning the Aston Martin, the Porsche Cayenne GTS (VIN 1710) and the Ferrari F12.

## The Aston Martin

### Summary

1. A summary of the dealings with respect to the Aston Martin is as follows:
2. CJS’s client, Mr Georges, was interested in purchasing an Aston Martin. CJS instructed Stallion to locate one for around $430,000, inclusive of GST and LCT.
3. Stallion located an Aston Martin and negotiated a price of $434,000.01, an amount which included LCT of $85,354.15 and GST of $31,695.11. CJS instructed Stallion to go ahead with the purchase.
4. CJS agreed to sell the vehicle to Mr Georges for $415,000, including GST. CJS did not charge Mr Georges LCT.
5. Stallion issued a tax invoice to CJS in respect of the Aston Martin for $369,000 inclusive of GST. Stallion’s tax invoice did not contain a charge for LCT. CJS issued to Stallion an “ABN Quotation”.
6. The dealer, **Zagame** Automotive Pty Ltd, was paid a total of $434,000.01 from Stallion’s bank account. The contract of purchase nominated Stallion as a purchaser and identified the basis of sale as “retail”.
7. CJS arranged for the vehicle to be collected from Zagame and supplied the vehicle to its client, Mr Georges, having received from him the amount of $415,000.
8. Stallion recouped:
	1. the LCT which Stallion paid to Zagame, by claiming a decreasing LCT adjustment under s 15-30; and
	2. the GST paid to Zagame, by claiming an input tax credit.
9. The end result of these transactions was that CJS, a luxury car dealer, sold the Aston Martin for $415,000 (LCT free) to a “retail” customer at approximately the same time as the Aston Martin had been purchased on a retail basis for $434,000.
10. Ordinarily, a “retail” customer who purchases from a dealer will be charged LCT because the dealer will be liable for LCT on the supply. The amount of LCT payable by the dealer is the amount calculated under s 5-15(1), less “the sum of all luxury car tax that was payable in respect of any previous \*importation or supply of the car”: s 5-15(2). In calculating the amount of any previous supply under s 5-15(2)(b), a decreasing LCT adjustment must be taken into account: s 5-15(3). There was no LCT in respect of the purported sale by Stallion to CJS because CJS purportedly quoted to Stallion. If CJS adopted the approach that it was taking into account the LCT paid by Stallion, it would also have had to have taken into account the decreasing LCT adjustment which would have arisen by reason of the operation of s 15-30: s 5‑15(3). The existence of an LCT adjustment does not depend on whether the adjustment has been claimed.
11. In any event, CJS supplied the vehicle to its “retail” client for $415,000 without charging LCT. This was considerably less than the amount for which a client being charged LCT could ordinarily acquire such a vehicle, namely $434,000.01 after negotiation. The LCT and GST paid in respect of the vehicle by Stallion was recouped by Stallion. Accordingly, in substance, the luxury car was sold to a “retail” client without LCT or GST being permanently collected.
12. Whilst that is the obvious context and gives rise to a result which one would not assume to be contemplated by the statutory scheme, the question is whether the relevant provisions applied to the facts operated to permit Stallion to claim back the LCT and the input tax credits. Reliance was not placed by the Commissioner on any provision analogous to Part IVA of the *Income Tax Assessment Act 1936* (Cth).

### The Facts

1. In his first affidavit, Rai stated that Mr Wakim, in his first conversation concerning an Aston Martin, rang him saying: “We’re willing to pay around $430,000”. Rai knew that the Aston Martin was for a customer of CJS. The terms of this first conversation indicate that the intention of CJS, expressed by Mr Wakim to Rai, was that CJS wanted to acquire an Aston Martin for $430,000.
2. The amount of $430,000 which Rai was instructed to negotiate was an amount which included LCT. If it were otherwise, it would be a price which was obviously too high. For the reasons given next, I conclude that CJS instructed Stallion to purchase the Aston Martin on terms which included a charge in respect of LCT.
3. The evidence did not suggest that CJS ever wanted Stallion to acquire luxury cars on any basis other than one which included payment of LCT. On each occasion that CJS instructed Stallion to look for a vehicle stating a particular price, it was at a level which must have included LCT.
4. SMS messages between Rai and Mr Dewsnap (a salesperson at Zagame) showed that Rai dealt with Zagame on the basis that the purchase would include LCT. The SMS messages did not suggest that Rai attempted to negotiate the purchase price of the Aston Martin on the basis that Stallion would provide an “ABN Quotation”.
5. In cross-examination, Rai stated that he sought to purchase the Aston Martin exempt from LCT. I do not accept that evidence. That evidence was not given in any of his affidavits. It was not supported by any documentary evidence and was not consistent with the fact that Stallion purchased each of the nine luxury cars on a “retail” basis. Rai did not seek to give equivalent evidence with respect to each of the nine luxury cars. I conclude that the evidence was given in cross-examination only because Rai thought it assisted Stallion’s case, not because it was truthful.
6. I conclude that CJS instructed Stallion to purchase all nine luxury cars on the basis that LCT was payable. Stallion conducted its activities on that basis, as instructed by CJS.
7. Rai gave the following account of his initial conversation with Mr Wakim, referred to a paragraph [91] above, and the subsequent events:

**Aston Martin**

48. In or around November 2016, I received a telephone call from Simon. We exchanged words to the following effect:

Simon: *I need an Aston Martin Vanquish Coupe. We’re willing to pay around $430,000. Have a look around if you’re interested.*

Me: *Okay, thanks. I’ll look around and get back to you.*

49. I searched online and recall that I only found one car that matched the description required by Simon. I contacted that dealer and negotiated a price, although I cannot recall precisely the price that was negotiated.

50. I contacted Simon and advised him of the price, and he replied with words to the effect of “*no, that’s too much. Try to get it cheaper, otherwise we’re not interested in buying it*”.

51. Following this, I had four or five subsequent phone calls with the dealer, and with Simon, in which further negotiations regarding the price of the Aston Martin took place.

52. Once a suitable price had been negotiated, Simon advised me words to the effect of “We will issue you a quote confirming the car details. Once you send me your invoice, we’ll transfer the amount to you by RTGS. It should get to you immediately”. I then received a quote from CJS.

 **At page 18 of Exhibit “RM1” is a copy of the quote for the Aston Martin received from CJS.**

53. Once I received the quote, I paid a deposit of $5,000.00 to the dealer, Zagame, based in Victoria. The funds for the deposit were sourced from my personal funds, which were loaned to Stallion for the purposes of the deposit. The dealer then sent to me an invoice for $434,000.00 for the vehicle.

 **At page 27 of Exhibit “RM1” is a copy of the invoice issued by the dealer to Stallion.**

54.Once I received the invoice, I input the data into the Easy Cars system, including the Make, Model, registration details (although the Aston Martin was unregistered), vehicle identification number (SCFLLCFU0GGJ02806) and engine number.

55. I then generated an invoice through the Easy Cars system to Stallion’s customer (in this case CJS). The amount on the invoice for the Aston Martin was $369,000.00 and did not include an amount for luxury car tax (LCT).

56. I then sent this invoice to CJS through the Easy Cars system.

 **At page 36 of Exhibit “RM1” is a copy of the invoice issued by the dealer to Stallion.**

57. About two weeks after issuing the invoice to CJS, Stallion received $369,000.00 into its Freedom Business bank account.

58. I had previously loaned personal funds to Stallion. Stallion used these funds, as well as further funds of $30,000.00 borrowed from CJS, to cover the shortfall in Stallion’s purchase price, and transferred the full balance of the purchase price (being $429,000.00) to the dealer in full payment of its invoice for the vehicle.

1. This account of what occurred is not correct in a number of respects. What in fact occurred was as follows.
2. On 30 November 2016, Mr Dewsnap sent an email to Rai attaching a form to make a deposit with a credit card, an invoice and a contract of sale. The attached invoice recorded that the transaction was conducted at “Price Level – Retail”. It noted a total sale price of $434,000.01, which included a charge for LCT of $85,354.15 and GST of $31,695.11. The “special conditions” recorded that the price did not include on road costs, stamp duty, registration or transport fees and noted that the vehicle was to be collected from the Melbourne show room.
3. A deposit of $5,000 was made by Stallion. This was authorised by Rai on 30 November 2016 and transacted in Stallion’s bank account on 1 December 2016.
4. Also on 30 November 2016, Stallion issued an invoice to CJS. It identified a sale price to CJS of $369,000 which included an amount for GST of $33,545.45. There was no charge for LCT. There was no negotiation of this price between Stallion and CJS. I conclude that the sale price included in the tax invoice for the purported sale was dictated by CJS.
5. Stallion’s “police book” recorded that the Aston Martin was purchased by Stallion on 30 November 2016 and sold to CJS on the same day. It described the sale to CJS as “wholesale”.
6. An invoice dated 1 December 2016 from CJS to Mr Georges indicated a sale price of $415,000, including GST of $37,727.27. This invoice recorded that bank transfers of $50,000 and $100,000 had been received by CJS from its customer. It also recorded that $1,100 in cash had been received by CJS from its customer for “towing fees”. It recorded that part of the settlement was a trade in of a Mercedes Benz vehicle ($190,000). The invoice did not contain a charge for LCT.
7. CJS’s “police book” recorded that the Aston Martin was sold by CJS to Mr Georges on 1 December 2016.
8. The “Quotation of ABN for luxury vehicle” (or “ABN Quotation” as defined earlier) issued by CJS to Stallion bore the date 1 December 2016 and was signed by Ms Wakim. This document was emailed by CJS to Stallion on 6 December 2016. The reference to page 18 of “RM1” after [52] of Rai’s first affidavit (extracted above) was a reference to the “Quotation of ABN for luxury vehicle” which was dated 1 December 2016. It was not sent to Stallion until 6 December 2016. Contrary to Rai’s affidavit, the deposit transferred by Stallion to the dealer in respect of the Aston Martin was implemented on 30 November 2016, and transacted on 1 December 2016, before Stallion had received CJS’s “ABN Quotation”.
9. On 12 December 2016, Stallion received into its account amounts of $20,000 and $10,000 from CJS. In cross-examination, Rai stated that these were loans from CJS. For the reasons given at [73] to [84] above, I conclude that there were no loans from CJS. I conclude that these amounts were transferred to Stallion pursuant to an arrangement, not fully explained, but which involved CJS providing funding to Stallion for Stallion to effect payment to dealers in respect of luxury cars that CJS instructed Stallion to acquire, or CJS ultimately being responsible for such funding.
10. In the days before 13 December 2016, Mr Dewsnap and Rai exchanged a number of SMS messages which indicated that Zagame was becoming impatient about settlement and was pressing for the balance of $429,000 to be paid failing which the Aston Martin would have to be put back on the market.
11. On 13 December 2016, Mr Dewsnap and Rai exchanged SMS messages which indicated that a truck had arrived to collect the Aston Martin and that Zagame required settlement but would not release the Aston Martin without receipt of the $429,000 owing.
12. On 13 December 2016, Stallion received into its bank account three amounts totalling $434,000:
13. $369,000 from CJS at 1.29pm;
14. $20,000 at 1.20pm from Rai’s personal account; and
15. $45,000 at 1.35pm from Rai’s personal account.

Stallion’s bank statements contained the printed description “Loan” in relation to the amounts of $20,000 and $45,000 transferred from Rai’s personal account.

1. On 13 December 2016 at 1.46pm, an amount of $429,000 was transferred out of Stallion’s account to Zagame by way of settlement of the purchase of the Aston Martin.
2. SMS messages from Rai to Mr Dewsnap show that Rai sent a photograph of a printout confirming the RTGS transfer of $429,000. This resulted in the Aston Martin being released in Melbourne to be taken away by a truck. The representative of Zagame, in an SMS message, confirmed “she’s on her way” and stated: “I hope you enjoy the car”, suggesting that the representative understood that the car was being acquired for Rai’s or Stallion’s use as a “retail” customer.
3. Rai initially stated in cross-examination that he paid for the services of the truck which collected the Aston Martin. I reject that evidence. His assertions were not supported by any documentary evidence. Expenses of that nature were not recorded in Stallion’s records, including its “Trading, Profit and Loss Statement” for the six months ended 31 December 2016. I conclude that CJS paid for the truck to secure delivery of the vehicle to it or its customer, Mr Georges, CJS having first obtained payment on account of “towing fees” of $1,100 from Mr Georges – see [103] above. Later in cross-examination, Rai agreed that CJS organised the truck. I conclude that Stallion was not involved in arranging the truck to collect the Aston Martin and that Stallion did not pay for it.
4. In his first affidavit, Rai stated that the purchase of the Aston Martin was funded by the amount of $369,000 which Stallion received from CJS, funds of $30,000 borrowed from CJS and funds he had “previously loaned” Stallion.
5. Apart from the reference to “loans” in Stallion’s bank statements in respect of the amounts of $20,000 and $45,000 (referred to at [109] above), there were no records of Stallion which stated that there were loans from Rai to Stallion. There was no evidence of any interest paid in respect of such loans or repayment of capital. No records tendered by Stallion recorded any interest expense for any loan, whether from Rai, CJS or any other person or entity.
6. There was no evidence as to the source of the amounts totalling $65,000 which had been transferred from Rai’s account to Stallion’s account on 13 December 2016. There was an entry in CJS’s bank statements identifying a transfer of $10,000 on 2 November 2016 to “Raimon Moussa CommBiz”. Rai denied having any such account.
7. I am not satisfied that Stallion has explained the full nature of the dealings, in particular the funding arrangements, between itself and CJS relevant to the acquisition of the Aston Martin. I am not satisfied that the Aston Martin was paid for otherwise than with funds ultimately sourced from or beneficially owned by CJS, or for which Stallion would later be reimbursed, whether or not the amounts totalling $65,000 are correctly described as loans from Rai to Stallion. Further, I conclude that the Aston Martin was purchased on the understanding, as between Stallion and CJS, that CJS was responsible for the entirety of the purchase price and was at all material times to be the true owner of the Aston Martin. I am satisfied that the two amounts totalling $65,000 were transferred from Rai’s account to Stallion’s account. It is possible that they were loans. However, even if they were loans from Rai to Stallion, I consider that these amounts were paid pursuant to a broader set of arrangements involving CJS for the funding of the purchase of the luxury cars, the nature of which was never fully disclosed.
8. On 14 December 2016, Zagame sent Rai a final contract for signature. Rai emailed it back, signed, on 15 December 2016.
9. A Roads and Maritime Services (**RMS**) record containing “Vehicle Details” and “Vehicle Ownership History” and “Vehicle Plate History” indicated that the Aston Martin was acquired and disposed of by CJS on 14 December 2016 and that it was acquired by Mr Georges on 14 December 2016. There was no indication that the Aston Martin was acquired or disposed of by Stallion.
10. I am not satisfied that Stallion:
11. purchased the Aston Martin on its own account;
12. became the beneficial owner of the Aston Martin; or
13. sold the Aston Martin to CJS.
14. I find that the tax invoice issued by Stallion to CJS and the “ABN Quotation” issued by CJS to Stallion were created as part of a broader arrangement between CJS and Stallion, the precise nature of which was not fully explained. This is dealt with further at [221] to [228] below.
15. I am not satisfied for the reasons above, and for the further reasons given at [195] to [220] below, that Stallion was not CJS’s agent in entering into the transaction to purchase the Aston Martin from the dealer.
16. It follows that Stallion has failed to discharge its onus of establishing that the assessments were excessive, so far as they relate to the transactions concerning the Aston Martin. Stallion has failed to discharge its onus of establishing that it was entitled to claim in relation to the Aston Martin:
17. input tax credits – see: [235] to [240] below; or
18. a decreasing LCT adjustment – see: [241] to [248] below.

## The Ferrari F12

1. In his first affidavit, Rai asserted that – unlike any of the other eight purchases – CJS had some “limited involvement” in the negotiation and purchase of the Ferrari F12. His affidavit included:

**Ferrari F12**

75. CJS had no involvement in the negotiation and purchase of any cars by Stallion; there was, however, one car in which Simon had limited involvement, namely the Ferrari F152 F12 Berlinetta (VIN: ZFF74UHD000222619) (**the Ferrari**).

76. The purchase by Stallion of the Ferrari commenced as usual. Simon contacted me in or around December 2016 and said words to the effect of “I need a Ferrari F12, can you see how much you can get one for?”

77. I then searched and only found one dealer that held a Ferrari F12 that matched the description required of CJS.

78. I called the dealer several times over a number of days and tried to negotiate the price, but they did not allow for any reduction in the price.

79. I contacted Simon and we had a discussion to the following effect:

Me: I’ve found only one Ferrari F12, but this dealer won’t budge on the price. I’ve tried a few times with them, but they’re firm. They want $600,000.

Simon: Who’s the dealer?

Me: Ferrari Brisbane.

Simon: I’ve dealt with them before. Give me their number, I can call them and see if they will negotiate with me.

80. Simon then called me and said words to the effect of “I’ve spoken to the dealer. They’ve agreed to drop the price to $550,000.00. I’m happy with that. If you want to go ahead, we can do it as usual”.

81. I then contacted the dealer and purchased the Ferrari for the agreed price. Other than that phone call to Simon, the process was the same as for the other purchases by Stallion, and Simon was not otherwise involved.

82. Stallion sourced the Ferrari, had all other communications with the dealer regarding the car, and arranged for its collection from the dealership.

1. This was not an accurate account of what occurred. In fact, as is described in more detail below, CJS traded in its Ferrari California T as part of the purchase. CJS’s involvement in the purchase was significantly more than had been suggested in Rai’s first affidavit. Indeed, it was Stallion which had limited involvement in the negotiation and purchase.
2. Stallion’s and CJS’s “police books” were irreconcilable:
3. CJS’s “police book” indicated that it purchased the Ferrari F12 from Ferrari Brisbane on 1 December 2016. There was no suggestion in CJS’s “police book” that it acquired the Ferrari F12 from Stallion.
4. Stallion’s “police book” indicated that it purchased the Ferrari F12 from Ferrari Brisbane on 14 December 2016. It recorded that Stallion disposed of the Ferrari F12 on a wholesale basis to CJS on 15 December 2016 for $449,000.
5. As to the vehicle which CJS traded in for the Ferrari F12, CJS’s “police book” indicated that it had acquired a Ferrari California T on 14 July 2016. It recorded that, on 13 December 2016, it disposed of the Ferrari California T to Ferrari Brisbane.
6. Ms Wakim signed a letter dated 14 December 2016 addressed “to whom it may concern” which stated:

**RE; Trade of Ferrari California T**

CJS Group Sydney Pty Ltd T/as Euromarque Sydney can confirm that the Luxury Car Tax has been paid and never been claimed back on the Ferrari California T trade vehicle - Chassis #; ZFF77XJD000220319

1. A second letter, also dated 14 December 2016 and addressed “to whom it may concern”, signed by Ms Wakim stated:

**RE; Trade of Ferrari California T**

CJS Group Sydney Pty Ltd T/as Euromarque Sydney authorize Stallion NSW PTY LTD to trade this car to Ferrari Brisbane in the Sale of the Ferrari F12 Berlinetta.

Chassis Number of Ferrari California T to be traded; ZFF77XJD000220319

1. A “recipient created tax invoice” dated 13 December 2016 recorded that Stallion was the customer of Ferrari Brisbane and the seller of the Ferrari California T. This document bore Ms Wakim’s signature. Stallion was not the owner of the Ferrari California T and its name could only have been identified on that invoice as CJS’s agent. Stallion’s “police book” did not contain an entry which indicated that it owned the Ferrari California T. The proper construction of CJS’s second letter of 14 December 2014, set out immediately above, is that Stallion was appointed as CJS’s agent to trade in CJS’s Ferrari California T.
2. The evidence included two documents entitled “Vendor’s Statement to Dealer” issued under s 73(1) the *Motor Dealers and Chattel Auctioneers Act* *2014* (Qld). These related to the Ferrari California T. One of these was signed by Ms Wakim. The other was signed by Rai.
3. On 14 December 2016, Ferrari Brisbane charged $5,000 to a credit card linked to the Stallion account. On 15 December 2016, Ferrari Brisbane charged a further $5,000 to a credit card linked to the Stallion account.
4. Rai executed a “contract for the purchase of a new vehicle” dated 15 December 2016, relating to the Ferrari F12. The seller was Ferrari Brisbane. It recorded a sale price of $550,000.02, including GST of $39,806.97 and LCT of $112,123.39. It noted that settlement was, as to $280,000, funded by the trade-in of the Ferrari California T. Details of the Ferrari California T were provided, including the number of kilometres. Rai gave the following evidence in cross-examination:

COUNSEL: And there’s an odometer reading there of 3100. Do you see that down the – halfway down the page? Distance on odometer, 3100?

RAI: On – on the California?

COUNSEL: Yes?

RAI: Yep.

COUNSEL: Do you see that?

RAI: Yep.

COUNSEL: Okay. Now, why did you sign this contract if you didn’t know anything about that car and whether that odometer reading was correct?

RAI: Don’t know.

COUNSEL: You don’t know?

RAI: I just believed – I believe in Simon.

1. In re-examination, he gave the following evidence:

COUNSEL: All right. And you were asked:

*Why did you sign this contract if you didn’t know anything about that car and whether that odometer reading was correct?*

And you said you don’t know; do you recall that?

RAI: Yes. Yes.

COUNSEL: You said you didn’t know:

 *I just believed – I believe in Simon.*

Do you recall saying that?

RAI: Yes.

COUNSEL: What did you mean by that?

RAI: That means that I know Simon is a friend of mine and whatever he has put in there would be correct.

1. In his second affidavit, Rai stated:

Ferrari F12

16. As referred to in my affidavit sworn 22 June 2018, I was aware prior to purchasing the Ferrari F12 that Simon had some involvement in the purchase of that car by contacting the dealer and negotiating the price.

17. LMM Holdings Pty Ltd (**LMM Holdings**) have produced documents in response to a subpoena.

18. Two of the documents produced in packet S5 appear to be letters signed by Anna Wakim on behalf of CJS Group Sydney Pty Ltd. The first of these letters appears to authorise Stallion NSW Pty Ltd to trade a Ferrari California T to Ferrari Brisbane in the sale of the Ferrari F12. The second letter confirms on behalf of CJS Group Sydney Pty Ltd that the Luxury Car Tax has been paid in respect of the Ferrari California T. Until seeing the documents produced by LMM Holdings, I had never seen these letters and was not aware of their existence, or that they were provided to LMM Holdings.

 **Annexed and marked “RM1” is a copy of these letters**

19. Further documents were produced by LMM Holdings in packet S8. Part of these documents appear to show text message communication between Simon Wakim and Adam O’Brien in respect of the purchase of the Ferrari F12. Until seeing these documents, I was not aware of these text messages or the level of contact that Simon had with LMM Holdings. To my knowledge, Simon was only involved with the negotiation of the price of the Ferrari F12.

 **Annexed and marked “RM2” is a copy of the text messages between Simon Wakim and Adam O’Brien.**

20. I recall that, upon receiving the invoice from LMM Holdings to Stallion, I noticed an entry for the trade in of a Ferrari California T. I found this to be strange at the time. However, I recall that the payout amount for the Ferrari California T was the same as the value of that car, and as such, it did not affect the price of the Ferrari F12. I raised this with Simon at the time. I do not call [sic] what his response was, however I recall that I did not enquire further about this, since it did not ultimately affect the price. As such, I disregarded it at the time.

1. As noted earlier, the purchase of the Ferrari F12 was negotiated to include the trade in of the Ferrari California T owned by CJS. Stallion played no part in this negotiation and, indeed, was unaware of it until he had received from Ferrari Brisbane an invoice referring to the trade in. The negotiations between CJS and Ferrari Brisbane necessarily involved (a) an assessment of the value of both the Ferrari F12 and the Ferrari California T; and (b) a consideration by both parties (CJS and Ferrari Brisbane) as to what their respective profits might be having regard to such matters as how much they had each incurred in acquiring and holding their respective luxury cars.
2. On 15 December 2016, Rai sent an email to Mr Wakim’s CJS email account attaching a draft “Quotation of ABN for Luxury Vehicle” in relation to the Ferrari F12, asking “Anna” (Ms Wakim) to fill it out and send it back. This email was forwarded by Rai on 24 December 2016 to CJS. On 2 January 2017 the completed “Quotation of ABN for Luxury Vehicle” was returned, bearing the date 15 December 2016 and bearing Ms Wakim’s signature.
3. On 15 December 2016, Stallion issued a tax invoice to CJS in relation to the Ferrari F12. It indicated a sale price of $449,000, including GST of $40,818.18. It indicated that a deposit of $10,000 had been received. There was no evidence given as to how the sale price recorded in the invoice was determined. There was no negotiation. I infer the amount was dictated by CJS.
4. The evidence furnished no cogent explanation as to why CJS would be prepared to pay Stallion an amount of $449,000 when CJS also traded in its Ferrari California T to Ferrari Brisbane.
5. Stallion’s bank statements indicated that, on 23 December 2016, Stallion received the following RTGS payments:
6. at 11.11am, $100,000 from **CNH Management** Pty Ltd; and
7. at 4.07pm, $429,000 from CJS.

The bank statement was marked with a handwritten annotation “FERRARI”.

1. On one copy of Stallion’s bank statement, next to the entry for the RTGS payment of $100,000, there was handwriting stating: “Loan to Company”. The handwriting on the bank statements was placed there, together with other annotations, by an accountant who assisted Stallion in the context of inquiries made by the Australian Taxation Office (**ATO**) sometime after the relevant events occurred. In his first affidavit, Rai stated that Stallion borrowed $100,000 from CNH Management. He claimed these funds were used to cover the shortfall in the purchase of the Ferrari F12. An email dated 17 May 2017 from Ms Nancy Hadidi of CNH Management stated that CNH Management “did transfer a loan to Raymond Moussa for the amount of $100,000.00”. It stated that the loan was for 6 months ending on 23 June 2017, after which it would need to be transferred back into the account from which it had been transferred. Rai’s evidence, in his first affidavit sworn 22 June 2018, was that the amount had not been repaid. In submissions, Stallion described Ms Hadidi’s email as an “incontrovertible business record” recording the loan and its terms. The email was in fact a response given to the ATO in relation to a “request for information” made to CNH Management. The email was only a business record in a very loose sense.
2. I am not satisfied that the arrangements between CNH Management and Stallion have been fully explained. No person from CNH Management was called to give evidence. There was no business record of Stallion which suggested the existence of the loan. There was nothing which suggested the payment of interest, if interest was payable. There was no evidence of any demand or request for repayment, notwithstanding the substantial sum was long overdue at the time of the hearing. The handwritten annotation on one of Stallion’s bank statements, made after the relevant events by an accountant retained by Stallion to assist with the ATO’s inquiries, is of no weight.
3. If the $100,000 was a loan from CNH Management to Stallion, I am not satisfied that there were no other financial arrangements relevant to funding the purchase of the Ferrari F12. The probabilities are that CJS ultimately funded the whole purchase price of the Ferrari F12. I conclude that Stallion and CJS operated on the mutual understanding that the Ferrari F12 was, at all material times from its purchase from Ferrari Brisbane until the time when CJS disposed of it, beneficially owned by CJS.
4. On 23 December 2016 at 4.56pm an internet withdrawal was made from Stallion’s account in the sum of $500,000.
5. On 24 December 2016 at 12.17pm an internet withdrawal was made from Stallion’s account in the sum of $40,000.
6. On 23 and 28 December 2016 amounts of $500,000 and $40,000 were received by Ferrari Brisbane. The relevant Bank of Queensland entries included the name “RAIMON”.
7. Ferrari Brisbane issued a “New Vehicle Tax Invoice” dated 29 December 2016 to Stallion. The invoice included the following:
8. the vehicle price was $495,692, to which options and delivery charges were added, and the total price was $551,695.50;
9. a discount of $153,625.84 was applied reducing the total price to $398,069.66;
10. GST was $39,806.97 and LCT was $112,123.39 giving a total price of $550,000.02;
11. the trade in of the Ferrari California T for $280,000 was acknowledged, but was wholly offset by a “payout to Assetline Australia Pty Ltd”;
12. two deposits of $5,000 had been paid by the Customer.
13. An RMS record containing “Vehicle Details” and “Vehicle Ownership History” and “Vehicle Plate History” recorded that the Ferrari F12 was acquired by CJS on 4 January 2017 and disposed of on 10 January 2017 to Mr Scopelliti. It did not record the Ferrari F12 as having ever been owned by Stallion.
14. I am not satisfied that Stallion:
15. purchased the Ferrari F12 on its own account;
16. became the owner of the Ferrari F12;
17. sold the Ferrari F12 to CJS.
18. I find that the tax invoice relating to the Ferrari F12 issued by Stallion to CJS and the “ABN Quotation” issued by CJS to Stallion were created as part of a broader arrangement between CJS and Stallion, which was not fully explained. This is dealt with further at [221] to [228] below.
19. I am not satisfied for the reasons above, and for the further reasons given at [195] to [220] below, that Stallion was not CJS’s agent in entering into the transaction to purchase the Ferrari F12 from the dealer.
20. It follows that Stallion has failed to discharge its onus of establishing that the assessments were excessive, so far as they relate to the transactions concerning the Ferrari F12. Stallion has failed to discharge its onus of establishing that it was entitled to claim in relation to the Ferrari F12:
21. input tax credits – see: [235] to [240] below; or
22. a decreasing LCT adjustment – see: [241] to [248] below.

## The Porsche Cayenne GTS (VIN 1710)

1. The ultimate purchaser of the Porsche Cayenne GTS (VIN 1710) was Mr Xie. He had affirmed an affidavit in these proceedings. So had Mr Chen, who had worked for the Porsche dealership from which the vehicle was acquired. Neither of these witnesses were called as they could not be located by the time of the hearing. Their affidavits were admitted. However, in circumstances where neither was cross-examined it is not appropriate to give weight to the statements of their accounts unless those accounts are corroborated by uncontroverted facts. In particular, Mr Xie stated that he gave Fred $120,000 in cash when the car was collected. Fred admitted being at the dealership at the time of delivery but adamantly denied being given $120,000 in cash by Mr Xie.
2. On the other hand, the documents referred to in those affidavits (including the printouts of SMS messages between Mr Xie and Mr Wakim) were admitted without objection as part of the Court Book (Exhibit 1). It was not suggested that they were in any way unreliable.
3. Mr Xie stated in his affidavit that, in December 2016, he had decided to buy a Porsche Cayenne GTS for his company, **JAYF Interiors** Pty Ltd, and visited the Porsche Centre Willoughby. Mr Xie’s friend told him that he knew someone selling cars more cheaply and gave him Mr Wakim’s telephone number.
4. An email from the CBA sent on 22 December 2016 informed Mr Xie that his “Asset Finance Application” had been conditionally approved. The conditions included that the vehicle had to be purchased from a “Suitable Supplier”. The amount to be financed was $120,000.
5. Mr Xie stated that he called Mr Wakim in January 2017 and that Mr Wakim told him he could get the vehicle he wanted. Mr Xie then went, with his friend, to the Porsche Centre Willoughby to look at a Porsche Cayenne.
6. Mr Chen – who worked at the Porsche Centre Parramatta – stated in his affidavit that, on 18 January 2017, he received a call from a person identifying himself as “Raimon Moussa” enquiring about the availability of a black Porsche Cayenne GTS for immediate delivery. Mr Chen stated there was one available and a time was arranged for “Raimon Moussa” to visit the dealership.
7. Mr Chen’s account was not dissimilar to Fred’s account. In his affidavit, Fred admitted that he represented he was Rai, stating:

7. Brandon and I had a discussion to the following effect:

Me: Hi, my name is Fred. I am looking to buy a Porsche Cayenne GTS.

 Brandon: We have a black one in stock.

 Me: What can you do about the price?

 Brandon: We can’t budge much on the advertised price.

8. I cannot recall precisely what the advertised price was. However, I considered that I would call Brandon again and introduce myself as another prospective purchaser in order to try to negotiate the price further. Later that day, I called Porsche Centre Parramatta again and spoke to Brandon. We had a discussion to the following effect:

Me: Hi, my name is Ray. I am looking for a Porsche Cayenne GTS. Do you have any in stock?

Brandon: Yes, we have a black Porsche Cayenne GTS. It’s a 2016 model.

Me: How much do you have it for?

Brandon: It is for [ADVERTISED PRICE]*.*

Me: How much can you drop that? I don’t want to pay that much. Will you do $173,000?

Brandon: I’ll have to speak to a manager and get back to you.

9. Following my discussion with Brandon, we exchanged some text messages.

 **Annexed and marked FM1 are copies of my text messages with Brandon.**

1. In evidence in chief, Fred gave this evidence:

COUNSEL: Thank you. And I just want to take you to dealings you had with – ask you just to recall dealings you had with Mr Brandon Chen at a Porsche dealership?

FRED: Yes.

COUNSEL: Did you form an opinion at any point in your dealings with Mr Chen that he had you confused for Raimon?

FRED: He had me confused me for Raimon.

COUNSEL: Did you form an opinion at some point –

FRED: Yes.

COUNSEL: Well, how did you come to form that view?

FRED: Because he called me Raimon a few times and I kept on telling him I’m Fadel. I’m Fred.

COUNSEL: I see?

FRED: And he kept referring me to Rai.

1. In cross-examination he stated:

COUNSEL: … Now … you say some dealers that you contacted “agreed to a lower price with me during my first call and some negotiated with me over the course of several calls”. Where you had to negotiate over the course of several calls, did you sometimes pretend to be somebody else, like Rai?

FRED: No. The only time was with the Porsche. She got us confused and I said my brother was there and he –

COUNSEL: So? –

FRED: He kept on referring to me as Rai, so I just let it go but I had him on speaker. My brother was there and that’s it.

COUNSEL: So on – when you’re talking about the Porsche, are you talking about the Porsche Cayenne that you obtained or acquired from Porsche Parramatta?

FRED: Parramatta. Yes.

COUNSEL: And on that occasion, you concede that you did ring up and pretend to be Rai on that occasion?

FRED: I didn’t pretend anything. I did – I did call but Rai was present and I rang up the first time in which I said I was Fadel and then I said to him, “I’m with my brother, Rai,” and he just assumed that I was by myself and that’s it.

1. Rai did not give evidence that he was present at the time of the phone call where Fred represented he was Rai. If Rai had actually been there, Fred would have mentioned that fact in his affidavit. The SMS messages referred to in Fred’s affidavit start with Fred stating that he was Rai enquiring about the Porsche Cayenne GTS (VIN 1710).
2. I also note that Fred was shown to have executed a credit card authority which identified the card name as “Raimon Moussa”, with Rai’s credit card number, for payment of a $2,000 deposit in relation to the Mercedes M-AMG. Fred had earlier denied being involved in any financial aspects of relevant transactions, stating that his role had been limited to negotiations and taking delivery.
3. I found Fred’s evidence to be generally unreliable. He was prepared to give whatever answer he thought best served Stallion’s case.
4. Mr Chen stated in his affidavit that a man identifying himself as “Raimon Moussa” attended the Porsche Centre Parramatta and sought to negotiate the price. The General Manager approved a price of $175,000.
5. An “Offer to Purchase New Vehicle” bearing the date 18 January 2017, in an amount of $175,000 (including GST of $12,960.11 and LCT of $23,528.77) was addressed and given to Stallion. This indicated that the “price level” was “retail”. The “ABN” of Stallion was recorded as “Nonregistered”. It indicated that a deposit of $2,000 had been paid, such that a balance of $173,000 was owing. The $2000 deposit had been made at 6.46pm on 18 January 2017 by a visa card linked to Stallion’s account. Fred authorised this transaction, I infer with the knowledge of Rai.
6. Also on 18 January 2017, CJS issued to JAYF Interiors a “Tax Invoice For the Purchase of a Used Car” in an amount of $160,000 ($15,000 less than the acquisition price). CJS also issued to JAYF Interiors a “Contract For the Purchase of a Used Car”, also specifying an amount of $160,000. Neither of these included a charge for LCT. Although these documents identified the car as “used” they related to the new car about which Stallion was inquiring.
7. Mr Xie sent an SMS to Mr Wakim’s phone which included a digital copy of the “Contract for the Purchase of a Used Car” received from CJS and asked:

Can I confirm is this the new car we saw last week? And do we need to sign and email it back the invoice?

1. The response was: “Confirmed and yes please sign and send back”. The evidence did not explain why CJS’s transaction documents referred to a “used car”.
2. Mr Xie stated that Mr Wakim told him that he was a shareholder in the Porsche Centre Willoughby and Porsche Centre Parramatta. Mr Xie sent an SMS on 18 January 2017 which stated:

We pay 120000 by bank finance and 40000 by cash, and we pick up the car in your shop?

1. Mr Wakim’s response was: “We deliver to you” and “Please send address”. Mr Xie responded: “We want to pick up in shop”.
2. On 19 January 2017, Rai sent an email to CJS attaching a pro forma “ABN Quotation”, incorrectly dated 19 January 2016. This was forwarded by Rai on 1 February 2017 to CJS with a message asking Ms Wakim to give him the “ABN Quotation”.
3. On 19 January 2017, Fred visited the Porsche Centre Parramatta. I infer that fact from SMS messages between Mr Chen and Fred which included: “Hi Raimon, are you still coming in now? Brandon Porsche Parramatta”. Fred responded: “15 mins”.
4. Stallion issued a “Tax Invoice For the Purchase of a Used Car” to CJS dated 19 January 2017. This was for $149,900 (including GST of $13,627.27). There was no charge for LCT.
5. On 20 January 2017, Mr Xie sent various SMS messages to Mr Wakim, one of which was a digital copy of a deposit receipt for $30,000 which had been banked into CJS’s account.
6. A registration receipt for $8,270 identifying Stallion as the registered owner was issued on 20 January 2017.
7. Mr Xie stated in his affidavit that, on 23 January 2017, he arranged with Mr Wakim to pick up the car from the dealership. He said he was told by Mr Wakim to meet Fred there. Mr Xie stated that his finance had not been arranged and he borrowed $120,000 in cash from family and friends to pay the balance owing to CJS.
8. At 9.45am on 24 January 2017, Mr Chen sent an SMS message to Fred saying: “Hi Raimon, can you call me! Brandon from Porsche Parramatta”.
9. On 24 January 2017:
10. at 12.29pm, Stallion received into its account $149,900 by RTGS payment from CJS;
11. at 12.31pm, Stallion received into its account $25,100 by RTGS payment from CJS;
12. at 12.57pm, Mr Chen sent an SMS message to Fred, sending a digital copy of the Porsche Centre Parramatta’s bank details and stating: “Please send me the remittances once the payment is made”; and
13. at 1.08pm, Stallion made an RTGS payment to the relevant account of the Porsche Centre Parramatta.
14. It is to be observed that the entirety of the amount paid to the Porsche Centre Parramatta in respect of the luxury car, an amount of $175,000, was sourced from CJS’s funds which had first been transferred into Stallion’s account by CJS.
15. Mr Xie stated in his affidavit that, on 24 January 2017, he met some men he was given to understand by Mr Wakim was Fred and Fred’s driver at the Porsche Centre in Parramatta. Mr Chen stated that he recalled seeing a man whom he understood was Rai (but which was Fred) with two Asian men at the dealership (presumably Mr Xie and his friend).
16. Mr Xie stated in his affidavit that he handed Fred $120,000 in cash to pay the balance of what he owed CJS for the car. Fred denied this in his affidavit and in cross-examination. It is not necessary to make a finding about how Mr Xie paid CJS for the vehicle.
17. Mr Xie stated that he tried to talk to the salesperson, but was told by Fred not to say too much. Mr Chen’s affidavit stated that Fred (whom he understood to be Rai) told him that the two Asian men worked either with or for Fred. Mr Chen said he recalled seeing the two Asian gentlemen inspect the car closely and one of them saying: “This is the car I’ve purchased”. Mr Chen’s affidavit stated that he then asked: “Who’s buying the car here? You or him?”, referring to Fred. Mr Chen’s affidavit stated that Fred then ushered the two men out of the dealership and stated he was buying the car and it was registered in his business name. It is not necessary to make findings about these matters.
18. The final “Offer to Purchase New Vehicle” dated 24 January 2017 was signed by Fred at the dealership on 24 January 2017. The document indicated that it was generated at 3.43pm.
19. Mr Chen stated he recalled seeing the person he understood to be Rai drive the vehicle out of the delivery bay, but that one of the Asian men accompanying him then drove it away from the dealership.
20. Mr Xie stated he recalled having to go, immediately, to register the vehicle at the RTA in Parramatta because his new car had apparently been registered in “another company’s name”. This aspect of Mr Xie’s affidavit evidence was corroborated by the RMS vehicle ownership records which indicated that the vehicle had been acquired by Stallion on 20 January 2017 and disposed of to Mr Xie’s company on 24 January 2017.
21. In relation to the Porsche Cayenne GTS (VIN 1710), I am not satisfied that Stallion:
22. purchased the car on its own account;
23. became the beneficial owner of the car;
24. sold the car to CJS.
25. I find that the tax invoice relating to the Porsche Cayenne GTS (VIN 1710) issued by Stallion to CJS was created as part of a broader arrangement between CJS and Stallion, the precise nature of which was not fully or satisfactorily explained. This is dealt with further at [221] to [228] below.
26. I am not satisfied for the reasons above, and for the further reasons given at [195] to [220] below, that Stallion was not CJS’s agent in entering into the transaction to purchase the Porsche Cayenne GTS (VIN 1710) from the dealer.
27. It follows that Stallion has failed to discharge its onus of establishing that it was entitled to claim in relation the Porsche Cayenne GTS (VIN 1710):
28. input tax credits – see: [235] to [240] below; or
29. a decreasing LCT adjustment – see: [241] to [248] below.

# CONSIDERATION

## Onus of proof

1. Stallion bore the onus of establishing that the assessments were excessive: s 14ZZO(b)(i) of the TAA. Accordingly, Stallion bore the onus of establishing that an entitlement to input tax credits and decreasing LCT adjustments arose as a result of its activities. As a practical matter, Stallion bore the onus of proving it purchased the luxury cars for on-sale to CJS and that it in fact sold them to CJS. It was not ultimately disputed by the Commissioner that, if Stallion discharged its onus of proving that it in fact purchased the luxury cars in its own right and genuinely on-sold them to CJS, then its activities amounted to an “enterprise” within the meaning of the GST Act.
2. Two elements of the Commissioner’s case should also be mentioned in the context of onus:
3. first, the Commissioner contended that Stallion acted as agent for CJS, albeit that this fact was not disclosed to the relevant dealers; and
4. secondly, the Commissioner contended that the tax invoices issued by Stallion to CJS and the “ABN Quotations” issued by CJS to Stallion were a “sham” in the sense that they were intended to give the appearance of a real sale of the luxury cars by Stallion to CJS when, in truth, there was no such sale – cf: ***Snook*** *v London and West Riding Investments Ltd* [1967] 2 QB 786; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; ***Raftland*** *Pty Ltd v Commissioner of Taxation* (2008) 238 CLR 516.
5. In circumstances where the Commissioner framed his case in this way, the consequence of Stallion bearing the onus by reason of s 14ZZO(b)(i) of the TAA was that Stallion bore the onus of establishing that:
6. first, in purchasing each of the nine luxury cars, it was not acting as CJS’s agent; and
7. secondly, the tax invoice and “ABN Quotations” reflected a genuine underlying transaction of sale by Stallion to CJS.
8. The Commissioner did not bear an onus of establishing the real or full nature of the transactions between Stallion and CJS to which the tax invoices and “ABN Quotations” related: *Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243 at 246[B] (Lockhart J); 258[G]-259[F] (Hill J).
9. For the reasons which follow, Stallion has not discharged its onus on either issue.

## Did Stallion acquire the luxury cars as agent for CJS?

1. As mentioned, the Commissioner conducted the case upon the basis that Stallion acted as agent for CJS in entering into the contracts of purchase of the luxury cars. The fact that Stallion was acting as CJS’s agent may not have been known to the dealers from whom the luxury cars were acquired, but that did not affect the legal consequence that the contracts of purchase were formed between the relevant dealers and CJS.
2. I should observe at the outset that Ferrari Brisbane may well have known that Stallion’s involvement in the transaction concerning the Ferrari F12 was as CJS’s agent. I say that because CJS informed Ferrari Brisbane that Stallion was authorised to trade CJS’s Ferrari California T (appointing Stallion as its agent at least for that purpose), CJS conducted all of the real negotiations and CJS arranged the collection of the car. Those circumstances tended to point to CJS as being the true purchaser of the Ferrari F12.
3. In respect of the remaining eight transactions, the existence and involvement of CJS (or Mr Wakim) was not known to most of the dealers. In relation to those dealers where the existence and involvement of CJS (or Mr Wakim) was known, the dealers may or may not have understood that Stallion was acting as CJS’s agent. The dealers who were unaware of any involvement of CJS were unlikely to have understood that Stallion was acting as agent for any person.
4. In ***Fabry*** *v Commissioner of Taxation* 2001 ATC 4,697 at [17], Merkel J adopted the formulation of the relevant principles in respect of undisclosed agency set out by the Privy Council in *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 at 207-208:

For present purposes the law can be summarised shortly as follows. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal’s behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal’s right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

The origin of, and theoretical justification for, the doctrine of the undisclosed principal has been the subject of much discussion by academic writers. Their Lordships would especially mention the influential article by Goodhart and Hamson ‘Undisclosed principles in contracts’ (1932) 4 CLJ 320, commenting on the then recent case of *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1. It seems to be generally accepted that, while the development of this branch of the law may have been anomalous, since it runs counter to fundamental principles of privity of contract, it is justified on grounds of commercial convenience.

The present case is concerned with the fifth of the features noted above. The law in that connection was stated by Diplock LJ in *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd*  [1968] 2 QB 545 at 555, as follows:

Where an agent has ... actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so willing.

1. An agent’s authority may be:
2. “actual”, arising from agreement between the principal and agent, such agreement being either express or implied from the parties’ conduct; or
3. “apparent” or “ostensible”, by reason of the principal’s conduct: *Freeman & Lockyer v Buckhurst Park Properties (Magnal) Ltd* [1964] 2 QB 480 at 502-503.
4. Whilst “apparent” or “ostensible” authority may have some relevance to the circumstances in which the Ferrari F12 was purchased, it may be put to one side because, for the reasons given below, Stallion has not discharged its onus of establishing that it was not actually CJS’s agent.
5. In the case of “actual” authority, the question is whether the parties consented to what amounts in law to a relationship of principal and agent; the parties do not themselves need to appreciate that the legal consequence of their consensual relationship is one of principal and agent. The “consent” may be express or it may be implied from the parties’ conduct. In *Fabry* at [23], Merkel J observed:

A similar approach applies to proof of the existence of agency. As was said by Lord Keith in *Garnac Grain Co Inc* v *HMF Faure & Fairclough Ltd* [1968] AC 1130 at 1137:

The relationship between principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it... The consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important.

1. Stallion has not discharged its onus of establishing that it did not act as CJS’s agent. That is sufficient for Stallion to have failed to discharge its onus of establishing that the assessments are excessive. However, I am satisfied that the true legal effect of the parties’ conduct was that CJS was the purchaser of each of the nine luxury cars and that Stallion acted as its agent in signing the contracts for the purchase of those cars. The contracts between the dealers and Stallion were not inconsistent with that possibility. Indeed, some of those contracts included warranties that the applicant was not, until it paid the full price of the cars, entitled to sell or transfer the cars.
2. In equity, title to the luxury cars vested in CJS immediately upon purchase from the relevant dealers. Even if legal title passed to Stallion as agent, it held legal title as a trustee, bound to follow the directions of CJS: *Georges v* ***Seaborn International*** *(Trustee), in the matter of Sonray Capital Markets Pty Ltd* (in liq) [2012] FCA 75 at [277] (Gordon J).
3. In addition to the reasons referred to above, including when dealing with the facts, I provide the following further reasons for concluding that Stallion has not discharged its onus of establishing that it did not act as CJS’s agent, arranged under the following headings:
4. The funding of the purchases from the dealers.
5. The timing of CJS’s transfers to Stallion.
6. CJS’s involvement in the purchase from the original dealers and in obtaining delivery.

### The funding of the purchases from the dealers

1. In relation to some of the luxury cars it was established that the entirety of the purchase price came from CJS, even though those funds were first banked into Stallion’s account. This was, for example, shown to be the case with respect to the Porsche Cayenne GTS (VIN 1710). The relevant facts are set out at [178] to [186] above.
2. A further example is provided by the last luxury car purchased, namely the Porsche Cayenne GTS (VIN 1608). Stallion’s bank statements record that it received into its account, from CJS, amounts totalling $170,000 ($21,000 and $149,000) on 20 January 2017. The purchase price of the vehicle was $170,000, which was paid by Stallion to the dealer on 25 January 2017. On Stallion’s case, CJS purchased the vehicle from Stallion for $149,000. Stallion contended that the further amount of $21,000 was a loan from CJS. I am not satisfied that it was, for the reasons identified at [73] to [84] above.
3. Another example is provided by the Rolls Royce. Stallion’s banking records indicated an amount of $570,000 was transferred to Bespoke Automotive Australia Pty Ltd trading as “**Trivett** Bespoke” on 10 January 2017. Stallion’s bank statements recorded a transfer to Stallion from CJS of $449,000 on 9 January 2017 and a “cash deposit” of $120,000 on 10 January 2017. In cross-examination, Rai agreed that the “cash deposit” was from CJS:

COUNSEL: The large cash deposit there came from CJS, didn’t it?

RAI: Yes, that’s correct.

COUNSEL: And it came in the form of cash, didn’t it?

RAI: Well, it says cash deposit.

COUNSEL: Yes?

RAI: Yes.

COUNSEL: So was that a bundle of cash that you received from –

RAI: No.

COUNSEL: – CJS?

RAI: I did not receive that. I did not put that in.

COUNSEL: What do you mean, you didn’t put it in?

RAI: I didn’t put that deposit in. That was transferred into my account.

COUNSEL: And you think it was transferred, what, from CJS?

RAI: That was deposited into my – into – transferred into Stallion’s account.

COUNSEL: Right?

RAI: Yes.

COUNSEL: Okay. So you – you’re saying someone else deposited it?

RAI: That’s correct.

COUNSEL: And you think it was CJS?

RAI: CJS, yes.

1. Stallion issued a tax invoice dated 23 December 2016 to CJS for the purported sale of the Rolls Royce for $469,000 (including GST of $42,636.36). No LCT was charged. The tax invoice recorded that an amount of $20,000 had already been paid, described as “bank transfer”, leaving a balance required of $449,000.
2. It was not contended that the “cash deposit” of $120,000 made by CJS into Stallion’s account was a loan. Even on the document produced by CJS for the purposes of answering the subpoena, Exhibit A3 referred to at [77] above and which I have found to be unreliable, it was not suggested that the cash deposit was a loan.
3. Whilst the documentary records did not go so far as establishing with respect to each of the nine luxury cars that the entire funding was sourced from CJS before purchase from the relevant dealers, I am not satisfied that the amounts paid to the various dealers for the nine luxury cars was paid otherwise than from funds ultimately provided by CJS or that, as between Stallion and CJS, CJS was ultimately responsible for the full amount charged by the relevant dealers. For the reasons identified at [73] to [84] above, I am not satisfied that there were loans made to Stallion by CJS.
4. When an agent has authority to receive and pay over moneys received on behalf of a principal, the principal will be deemed to have received and paid those monies: *Peterson v Moloney* (1951) 84 CLR 91; *Seaborn International* at [278] (Gordon J).

### The timing of CJS’s transfers to Stallion

1. Stallion submitted that the fact that CJS was willing to advance funds to Stallion before CJS obtained the vehicle “was a matter for CJS and the risk that it chose to take on in doing so”. There was no evidence from any person connected with CJS as to what it intended or why it acted in the way it did. I would not infer that the amounts transferred by CJS to Stallion were intended to be payments to Stallion for the purchase by CJS of cars which Stallion had not yet acquired. Rather, the timing and amounts of the funds provided by CJS in the transactions, assessed objectively, indicate that CJS transferred the funds to Stallion for the purchase of the cars from the dealers. In various cases, the cars would not be released by the relevant dealers because of non-payment. That inference is most clear where the full amount of the purchase price was transferred to Stallion and then immediately to the dealer – see, by way of example, the facts at [206] above.
2. I reject the submission that the funds provided by CJS were a “pre-payment” for a purchase by CJS from Stallion. If the amounts were intended to be pre-payments in relation to purchases by CJS from Stallion the total amounts transferred would not have exceeded the purchase prices identified in Stallion’s tax invoices. The fact that the total amounts paid were transferred in several tranches, one of which might correspond to the amount in Stallion’s tax invoices does not alter this conclusion.

### CJS’s involvement in the purchase from the original dealers and in obtaining delivery

1. Despite Rai’s statement that CJS had “no” involvement with the negotiation and purchase of the luxury cars from relevant dealers apart from what was said to be Mr Wakim’s “limited” involvement in the purchase of the Ferrari F12, it was shown that CJS did have more involvement than had been asserted. CJS’s involvement with respect to the purchase of the Ferrari F12 cannot sensibly be described as limited. CJS traded in its Ferrari California T to purchase the Ferrari F12. Stallion did not claim to have any involvement in the negotiation of the price for the trade-in. CJS also negotiated the price of the Ferrari F12, as would be expected if it were also trading in its own vehicle. In substance, Stallion merely lent its name to parts of the transaction. To the extent that the documents which Stallion executed in that transaction had any legal force at all, Stallion executed those documents as agent for CJS.
2. The evidence revealed further examples of CJS’s involvement. Mr Wirth who was a Brand Manager at Trivett gave unchallenged evidence, by affidavit, in relation to the purchase of the Rolls Royce. Mr Wirth, who had tried unsuccessfully to contact Rai, called Mr Wakim and asked him when he expected payment to be made. Mr Wirth was told by Mr Wakim to send through the bank details and Mr Wakim would “get it sorted”. The evidence showed that Mr Wirth sent to Mr Wakim, by SMS message on 28 December 2016, bank details to pay $30,000 balance on the deposit then owing. The fact that the deposit was not in fact paid, and that the Rolls Royce was ultimately purchased without first paying a deposit, is not to the point.
3. Fred gave evidence to the effect that the “usual practice” for delivery arrangements for the luxury cars was for Mr Wakim to arrange for CJS’s driver, John, to meet Fred at the relevant dealership. However, in cross-examination he stated that either Mr Wakim or John would be there.
4. As mentioned at [112] above, the delivery of the Aston Martin from Zagame in Melbourne was organised and paid for by CJS.
5. Rai did not seek to suggest that Stallion took delivery of the Ferrari F12. Indeed, he accepted that it was collected by truck, arranged by CJS. He accepted that the Rolls Royce, likewise, was collected by a truck arranged by CJS.
6. I have referred earlier to the circumstances in which the Porsche Cayenne GTS (VIN 1710) was collected. The Porsche Cayenne GTS (VIN 1608) was collected on 25 January 2017 from the dealer’s premises (at Porsche Centre, Willoughby) by Ms Yarar, CJS’s customer.
7. In this context it is also relevant to note that Stallion had no insurance, notwithstanding the significant value of the luxury cars. It was the understanding as between CJS and Stallion that CJS would obtain immediate delivery of the luxury cars to it or its customer.

## Were the tax invoices and “ABN Quotations” a sham?

1. In *Snook* at 802, Diplock LJ stated:

I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

1. In ***Hadjiloucas*** *v Crean* [1988] 1 WLR 1006 at 1019, Mustill LJ identified, as one of several situations where an agreement may be taken otherwise than at face value, the situation of “sham” of which his Lordship said:

Correctly employed, this term denotes an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to the true nature and effect of the legal relations between the parties.

1. These passages from *Snook* and *Hadjiloucas* were referred to with apparent approval in *Raftland* at [35] in the joint judgment of Gleeson CJ, Gummow and Crennan JJ.
2. Their Honours went on to observe, at [36], that whilst the “presence of an objective of deliberate deception indicates fraud”, the term “sham” can be used “in a sense which is less pejorative”. Their Honours made it clear that the whole of the circumstances had to be examined:

The presence of an objective of deliberate deception indicates fraud. This suggests the need for caution in adoption of the description “sham”. However, in the present litigation it may be used in a sense which is less pejorative but still apt to deny the critical step in the appellant’s case. The absence of a present entitlement within the meaning of s 100A(1)(a) of the Act [ITAA 1936] may appear from an examination of the whole of the relevant circumstances, and these are not confined to the terms of the Raftland Trust instrument.

1. In *Millar v Commissioner of Taxation* (2016) 243 FCR 302 at [82], in relation to the question of onus of proof where sham is alleged in Pt IVC proceedings such as these, Davies J (with whom Pagone J relevantly agreed at [45]) observed:

*Raftland* is clear authority that where sham is in issue, the Court is not confined to examining the documentation alone in determining the parties’ intentions. The Court may examine and draw inferences from other evidence, including the parties’ explanations as to their dealings and their subsequent conduct. Their subsequent conduct is relevant as evidence of their intentions, either because such conduct is consistent with the transactional documents or because such conduct is not consistent. In a proceeding under Pt IVC of the TAA in which the taxpayer has the onus of proving that the assessment is excessive, this means that where the transactional documents cannot be taken at face value because of apparent discrepancies between the legal rights created and the actual dealings, or where there is other evidence that indicates, or from which the inference may be drawn, that the parties’ intention is or may be different from the apparent arrangement, the taxpayer does not discharge the onus of proof without establishing that the parties did intend the documents to have legal effect according to their tenor.

1. There was no direct evidence of what CJS intended with respect to the legal effect or legal consequences of the tax invoices or “ABN Quotations”.
2. I am not satisfied that the mutual intention of the parties was that Stallion was to acquire the luxury cars in its own right and then on-sell them to CJS. Whilst Stallion issued invoices to CJS, reflecting a purported sale of the luxury cars by Stallion to CJS, these did not reflect actual sales. Rather, these were created as part of a broader arrangement between the parties which was not fully or satisfactorily explained. The tax invoices and “ABN Quotations” were likely created because they were seen as facilitating Stallion claiming input tax credits and decreasing LCT adjustments, not because the parties had negotiated and wanted to give effect to a genuine sale of the cars. The tax invoices and “ABN Quotations” were also likely created because CJS considered that the documents would assist CJS to on-sell the luxury cars without charging LCT to its clients.
3. I am not satisfied that it was the intention of either CJS or Stallion that Stallion ever in fact become the beneficial owner of any of the luxury cars, or that Stallion in fact sell the cars to CJS. I am not satisfied that it was not the parties’ intention that CJS was at all material times to become the true owner of the luxury cars immediately on acquisition of the cars and that CJS was ultimately responsible for the whole of the purchase price whatever the full detail of the parties’ funding arrangements were.

## Did Stallion acquire the cars on implied trust for CJS?

1. The Commissioner contended, as an alternative to his case that CJS purchased the luxury cars as CJS’s agent, that Stallion acquired the cars as trustee for CJS. The Commissioner correctly submitted that, where purchase money was provided by two or more persons jointly and the property put into the name of one only, a resulting trust in favour of the others was presumed, absent a relationship between the parties that might give rise to a presumption of advancement or evidence that the moneys were a gift or loan.
2. In *Calverley v Green* (1984) 155 CLR 242 at 266-267, Deane J stated the relevant principle as follows:

Where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it.

1. The Commissioner also referred to *Ong v Lottwo Pty Ltd (in liq)* [2013] SASCFC 57 at [28] and [30] and *Bateman Television Ltd (in liq) v Bateman and Thomas* [1971] NZLR 453 at 461 to 463.
2. The Commissioner referred to the evidence which indicated that all or a substantial amount of the monies that Stallion used to purchase the luxury cars came from transfers made into the bank account of Stallion from CJS immediately before funds were transferred by Stallion to the relevant dealer. The Commissioner also pointed to the fact that there were a number of instances of the settlement of the luxury car transactions being delayed to enable CJS to transfer funds to Stallion in connection with the acquisition.
3. These facts are some of the reasons why I am not satisfied that Stallion was not CJS’s agent and support the conclusion I have reached that, on the balance of probabilities, Stallion entered into the relevant purchase transactions with the dealers as the agent of CJS.
4. However, if I am wrong in not being so satisfied or in reaching that conclusion, I would conclude that Stallion has not discharged the onus of establishing that it acquired the luxury cars beneficially. It acquired them pursuant to an arrangement with CJS, not fully explained, but pursuant to which the parties intended that beneficial title to the vehicles rested with CJS on acquisition from the relevant dealers.

## No entitlement to input tax credits

1. The GST Act operates on the assumption that the general law of agency applies when applying the GST law. This is evident from the following:
2. Subdivision 153-A has the effect that a principal is entitled to claim input tax credits in respect of creditable acquisitions made by the principal’s agent. Section 153-5(1) of Subdiv 153-A provides that the principal will be entitled to claim the input tax credit in the first tax period in which the principal gives the Commissioner a GST return and the principal or the agent then holds a tax invoice.
3. Subdivision 153-B contains a specific regime that only applies where the principal and intermediary have entered into written agreements with the result that the intermediary is treated as a “separate” supplier or acquirer. There was no evidence that any such written agreement existed as between CJS and Stallion.
4. Division 57 contains a specific regime dealing with resident agents acting for non-resident principals which provides, amongst other matters, that the resident agent is entitled to claim input tax credits on the creditable acquisitions made by the non-resident, despite the general provisions of s 11-20 and s 15-15 about who is entitled to claim input tax credits: s 57-10.
5. The **Explanatory Memorandum** to the *A New Tax System (Goods and Services Tax) Bill 1998* stated at [6.277]:

If you make supplies through agents the general law of agency applies. That is, a thing done by your agent as agent for you is a thing done by you. You are liable for the GST on taxable supplies and importations made through your agent. You are entitled to the input tax credits on creditable acquisitions and importations you make through your agent. Your agent is not liable for the GST and is not entitled to the input tax credits.

1. Stallion did not discharge the onus of establishing that it was not CJS’s agent in relation to the purchases of the nine luxury cars. Indeed, I have concluded that Stallion entered into the purchase transactions as agent for CJS. Stallion did not acquire the luxury cars and it did not do so in the course of carrying on any enterprise as a motor dealer. Stallion did not make a creditable acquisition under s 11-5(a) and s 11-15(1) and was not entitled to claim input tax credits.
2. Further, there was no taxable supply by the relevant dealers to Stallion. The supply made by the dealers was a supply to CJS. It mattered not whether the dealers knew that the principal was CJS: *Crown Estates (Sales) Pty Ltd v Commissioner of Taxation* [2015] AATA 949 at [15]-[21] (McCabe DP); *Crown Estates (Sales) Pty Ltd v Commissioner of Taxation* [2016] FCA 335 at [43]-[44] (Logan J).
3. In the Commissioner’s alternative case – that Stallion acquired legal title to the vehicles as trustee for CJS – the luxury cars were not a “creditable acquisition” of Stallion under s 11-5 and s 11-15 and it was not entitled to claim any input tax credits; Stallion acquired the cars and immediately held them as trustee for the purposes of its beneficiary, CJS – cf: *Saga Holidays Ltd v Commissioner of Taxation* (2006) 156 FCR 256 at [29]-[30] (per Gyles, Stone and Young JJ). Stallion did not acquire the cars “in” carrying on its own “enterprise”.
4. The Commissioner disallowed the input tax credits claimed by Stallion and also amended the GST on sales to nil. It was correct to amend the GST on sales to nil: there was no sale to CJS in respect of which GST could be charged.

## No entitlement to LCT decreasing adjustments

1. Section 15-30 of the LCT Act sets out the circumstances in which a decreasing LCT adjustment arises:

**15-30 Changes of use—supplies of luxury cars**

1. 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

(c) you were \*registered at the time of the supply; and

(d) you intend to use the car for a \*quotable purpose; and

(e) you have only used the car for a quotable purpose.

1. Headings to sections form part of the LCT Act: s 23-1(1). The Commissioner submitted that this had the consequence that there must be a “change of use” in order for the provision to have any application. That submission cannot be accepted. The language of the section beneath the heading is clear as to when a person has a decreasing LCT adjustment. The statutory scheme does not necessarily require that there be a change in use, despite the heading.
2. The term “quotable purpose” is defined in s 27-1 of the LCT Act as:

***quotable purpose*** means a use of a \*car for which you may \*quote under section 9-5.

1. Section 9-5 included:

**9-5 Quoting**

(1)   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, and for no other purpose:

(a)   holding the car as trading stock, other than holding it for hire or lease; or …

1. The term “trading stock” is not defined in the LCT Act. It means “goods held by a trader in such goods for sale or exchange in the ordinary course of his trade” – cf: *Federal Commissioner of Taxation v Suttons Motors (Chullora) Wholesale Pty Ltd* (1985) 157 CLR 277 at 282; *Melbourne Car Shop Pty Ltd v Federal Commissioner of Taxation* [2010] FCA 373 at [23] (Jessup J).
2. For Stallion to have a decreasing adjustment under s 15-30 it was necessary that:
3. Stallion was “supplied” with a luxury car;
4. LCT was not paid because Stallion did not quote;
5. Stallion was registered at the time of the supply;
6. Stallion intended to use the luxury car for the purpose, and no other purpose, of holding the car as trading stock, other than hiring it for hire or lease; and
7. Stallion only used the car for the purpose, and no other purpose, of holding the car as trading stock, other than holding it for hire or lease.
8. As to (1), Stallion has not discharged the onus of establishing that it was “supplied” with the relevant luxury cars. The supply was, as discussed above, by the relevant dealers to CJS.
9. As to (4) and (5), Stallion has not discharged its onus of proving that it intended to use, and only used, the cars for the sole purpose of holding the cars as trading stock. Stallion was never going to “use” the cars at all. Stallion acted as agent for CJS.

## Liability for administrative penalties and remission of penalties

1. As noted at [9] above, Stallion conceded in closing submissions that, if its Part IVC “appeal” in relation to the amended assessments was dismissed, then the penalty assessments were not excessive and there was no error in failing to remit penalties. It follows that it is unnecessary to address penalties.

# CONCLUSION

1. The “appeal” must be dismissed.

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| I certify that the preceding two hundred and fifty (250) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Thawley. |

Associate:

Dated: 19 August 2019