FEDERAL COURT OF AUSTRALIA

ACN 154 520 199 Pty Ltd (in liquidation) v Commissioner of Taxation [2020] FCAFC 190

|  |  |
| --- | --- |
| Appeal from: | *ACN 154 520 199 Pty Ltd (In Liq) and Commissioner of Taxation (Taxation)* [2019] AATA 5981 |
|  |  |
| File number: | NSD 53 of 2020 |
|  |  |
| Judgment of: | **PERRAM, MOSHINSKY AND THAWLEY JJ** |
|  |  |
| Date of judgment: | 6 November 2020 |
|  |  |
| Catchwords: | **TAXATION** – goods and services tax – precious metal – creditable acquisitions – creditable purpose – whether the taxpayer’s supply of gold to dealers was GST-free or input taxed – where the taxpayer acquired gold that was already of 99.99% fineness, but not in investment form, and therefore not “precious metal” as defined – where the taxpayer processed and sold the gold to dealers in “precious metal” form – whether the taxpayer’s supply of gold to dealers was the “first supply of that precious metal after its refining by … the supplier” and therefore GST-free – construction of “refining” – construction of the “first supply” requirement for a GST-free supply of precious metal**ADMINISTRATIVE LAW** – procedural fairness – where the Tribunal made adverse knowledge findings on the basis of two emails and the transcript of a compulsory examination that had not been the subject of any cross-examination or any submissions by the parties – whether the Tribunal denied the taxpayer procedural fairness – whether any denial of procedural fairness was material**TAXATION** – goods and services tax – anti-avoidance provisions – where the Tribunal found (in the alternative to its conclusion regarding construction) that the anti-avoidance provisions applied – whether the Tribunal erred in its approach to the anti-avoidance provisions, in particular the issues of dominant purpose and principal effect  |
|  |  |
| Legislation: | *Acts Interpretation Act 1901* (Cth), s 15AA*Administrative Appeals Tribunal Act 1975* (Cth), ss 33, 44*A New Tax System (Goods and Services Tax) Act 1999* (Cth), ss 7-1, 9-30, 11-1, 11-5, 11-15, 11-20, 11-25, 17-5, 38-1, 38-385, 40-1, 40-100, 165-1, 165-5, 165-10, 165-15, 165-40, 195-1*Evidence Act 1995* (Cth), s 164*Income Tax Assessment Act 1936* (Cth)*Tax Administration Act 1953* (Cth), s 14ZZK  |
|  |  |
| Cases cited: | *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1*Annetts v McCann* (1990) 170 CLR 596*Attorney-General v Colonial Sugar Refining Company Ltd* (1900) 26 VLR 83*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321*Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345*AXA Asia Pacific Holdings Ltd v Federal Commissioner of Taxation* (2008) 173 FCR 500*Caltex Australia Petroleum Pty Ltd v Federal Commissioner of Taxation* (2008) 173 FCR 359*Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378*Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576*Degning v Minister for Home Affairs* [2019] FCAFC 67*Federal Commissioner of Taxation v American Express Wholesale Currency Services Pty Ltd* (2010) 187 FCR 398*Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503*Federal Commissioner of Taxation v Hart* (2004) 217 CLR 16*Federal Commissioner of Taxation v Ludekens* (2013) 214 FCR 149*Federal Commissioner of Taxation v Spotless* *Services Ltd* (1996) 186 CLR 404*Federal Commissioner of Taxation v Star City Pty Ltd* (2009) 175 FCR 39*Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315*HP Mercantile Pty Ltd v Federal Commissioner of Taxation* (2005) 143 FCR 553*Jones v Dunkel* (1959) 101 CLR 298*Kelly v The Queen* (2004) 218 CLR 216*Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390*Mayes, Internal Revenue Collector v Paul Jones & Co* (1921) 270 F 121*Mills v Federal Commissioner of Taxation* (2012) 250 CLR 171*Minister for Immigration and Multicultural Affairs v Al-Miahi* (2001) 65 ALD 141*R v A2; R v Magennis; R v Vaziri* (2019) 373 ALR 214*Rawson Finances v Federal Commissioner of Taxation* (2013) 296 ALR 307*Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82*Rio Tinto Services Ltd v Federal Commissioner of Taxation* (2015) 235 FCR 159*Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152*SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362*Zeroz Pty Ltd v Deputy Commissioner of Taxation* (1997) 35 ATR 349  |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Taxation |
|  |  |
| Number of paragraphs: | 233 |
|  |  |
| Date of last submissions: | 4 June 2020 |
|  |  |
| Date of hearing: | 27, 28 and 29 May 2020  |
|  |  |
| Counsel for the Applicant: | Mr JO Hmelnitsky SC with Mr BL Jones |
|  |  |
| Solicitor for the Applicant: | Polczynski Robinson |
|  |  |
| Counsel for the Respondent: | Mr GJ Davies QC with Mr EF Wheelahan QC, Mr G O’Mahoney and Ms CM Pierce |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

|  |  |
| --- | --- |
|  | NSD 53 of 2020 |
|   |
| BETWEEN: | ACN 154 520 199 PTY LTD (IN LIQUIDATION)Applicant |
| AND: | COMMISSIONER OF TAXATIONRespondent |

|  |  |
| --- | --- |
| order made by: | PERRAM, MOSHINSKY AND THAWLEY JJ |
| DATE OF ORDER: | 6 NOVEMBER 2020 |

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The decision of the Administrative Appeals Tribunal made on 20 December 2019 be set aside.

3. The matter be remitted to the Administrative Appeals Tribunal (differently constituted) for determination according to law.

4. Subject to paragraph 5, the respondent pay the applicant’s costs of the proceeding, as agreed or assessed.

5. If either party wishes to seek a different costs order, the party may within 14 days file and serve an outline of submissions (of no more than three pages) on costs. In that event, the other party may within a further 7 days file and serve a responding submission (of no more than three pages).

6. Subject to further order, the reasons for judgment of the Full Court not be published other than to the parties, and be kept confidential to the parties, for a period of 10 days.

7. Within seven days, the parties inform the Court whether they consider that any part or parts (and, if so, which part or parts) of the reasons for judgment of the Full Court needs or need to be the subject of non-publication and confidentiality orders.

8. There be liberty to apply.

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1 The applicant, ACN 154 520 199 Pty Ltd (in liquidation) (**ACN 154**), appeals on a question of law from a decision of the Administrative Appeals Tribunal (the **Tribunal**) pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**). The appeal is in the Court’s original jurisdiction, which is being exercised by a Full Court.

2 The matter concerns the entitlement of ACN 154, a refiner of gold, to input tax credits under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (the **GST Act**). The relevant period for the purposes of the matter is 1 February 2012 to 30 June 2014 (the **relevant period**).

3 During the relevant period, ACN 154 traded as “EBS & Associates” and described its business to the respondent (the **Commissioner**) as involving the acquisition and refining of scrap and other metal in order to produce precious metal for sale to dealers. ACN 154 acquired gold that was not in investment form (**scrap gold**); the scrap gold was converted or refined into precious metal, that is, gold in investment form of at least 99.5% fineness; the gold was then sold by ACN 154 to dealers in precious metal.

4 The majority of the scrap gold acquired by ACN 154 during the relevant period was already of at least 99.99% fineness, referred to in the parties’ submissions as “four nines” gold. (Such gold was nevertheless *scrap gold* because it was not in investment form.) It followed that some of the refinery processes were not engaged, or not engaged to the same extent as they would have been if ACN 154 had been processing scrap gold that was less than 99.99% fineness. Put simply, it is quicker, easier and cheaper for the refiner to work with material that has already been refined to the point of fineness expected of investment-grade bullion.

5 ACN 154’s turnover increased dramatically during the relevant period. In the last five months of the 2012 financial year, its turnover was approximately $63 million. In the 2013 financial year, its turnover surged to approximately $595 million. In the 2014 financial year, turnover increased to approximately $746 million.

6 ACN 154 claimed input tax credits in relation to its acquisitions of scrap gold during the relevant period. The relevant provisions and issues were, in brief summary, as follows:

(a) Under Div 11 of the GST Act, ACN 154 was entitled to claim input tax credits for “creditable acquisitions” that it made. For ACN 154’s acquisitions of scrap gold to constitute creditable acquisitions, ACN 154 needed to acquire the scrap gold for a “creditable purpose”: s 11-5. Section 11-15(2) relevantly provides that a taxpayer does not acquire a thing for a creditable purpose to the extent that the acquisition relates to making *supplies* that would be *input taxed*.

(b) The gold that ACN 154 sold to dealers was “precious metal”, which is relevantly defined in the GST Act to mean gold (in an investment form) of at least 99.5% fineness.

(c) Under Div 40 of the GST Act, a supply of precious metal is *input taxed*. However, under s 38-385, a supply of precious metal is *GST-free* (and thus, in the present circumstances, *not* input taxed) if, relevantly, it is the “first supply of that precious metal after its refining by … the supplier”.

(d) Accordingly, critical to ACN 154’s claim for input tax credits in respect of its *acquisitions* of scrap gold was determining whether its *supplies* of gold to the dealers were GST-free within the meaning of s 38-385 (and thus not input taxed).

7 It transpired that a number of the suppliers of scrap gold to ACN 154 were pocketing the GST they should have been remitting to the Commissioner in respect of the supplies of scrap gold to ACN 154. It also transpired that a number of the suppliers of scrap gold to ACN 154 were: purchasing gold in precious metal form (directly or indirectly) from the dealers to which ACN 154 sold gold in precious metal form; defacing or damaging the gold so that it was no longer in investment form; and selling the gold (now, scrap gold, but still of 99.99% fineness) to ACN 154.

8 On 8 April 2016, the Commissioner issued notices of assessment and notices of amended assessment of net amount disallowing certain input tax credits (totalling approximately $122 million) claimed by ACN 154 in its business activity statements in the relevant period. The Commissioner’s position was that the relevant *supplies* of precious metals by ACN 154 to the dealers did not satisfy the requirements of s 38-385; they were, therefore, *input taxed supplies*. It followed that ACN 154 was not entitled to claim the relevant input tax credits in relation to its *acquisitions* of scrap gold.

9 In the alternative, the Commissioner made determinations under the anti-avoidance provisions in Div 165 of the GST Act, and issued alternative notices of assessment reflecting the determinations. By the determinations and alternative notices of assessment, the Commissioner reversed certain input tax credits (totalling approximately $73 million) claimed by ACN 154 in its business activity statements during the relevant period, arising out of transactions involving a sub-set of suppliers. In brief terms, the Commissioner considered that Div 165 operated on the basis that: (a) ACN 154 had obtained a “GST benefit” (in the form of the input tax credits) from a “scheme” within the meaning of the relevant provisions; and (b) one or more of the entities (including the relevant suppliers) entered into or carried out the scheme for the dominant purpose of giving ACN 154 the GST benefit, or the principal effect of the scheme was that ACN 154 obtained the GST benefit.

10 ACN 154 objected to the assessments and amended assessments (the **assessments**). The objections were disallowed. ACN 154 applied to the Tribunal for review of the objection decisions.

11 There were three main issues before the Tribunal:

(a) The first issue was whether, on the proper construction of s 38-385 of the GST Act, the *supplies* of gold made by ACN 154 to the dealers were *GST-free*. This issue concerned the meaning of the words “refining” and of the concept of “first supply” in s 38-385. As noted above, under s 38-385, a supply of precious metal is GST-free if, relevantly, it is the “first supply of that precious metal after its refining by … the supplier”. The Commissioner contended that ACN 154’s supplies of gold to the dealers were not GST-free because ACN 154 was not “refining” the scrap gold that it acquired and because ACN 154’s supply was not the “first supply” of the precious metal. On the other hand, ACN 154 contended that its supplies of gold to the dealers were GST-free within the meaning of s 38-385; it followed that they were not input taxed supplies, and that ACN 154 was entitled to the input tax credits (of approximately $122 million) in respect of its acquisitions of gold from the suppliers.

(b) If the construction issue was determined adversely to the Commissioner, a second issue arose, namely whether the anti-avoidance provisions in Div 165 of the GST Act applied.

(c) The third issue was whether the penalties imposed by the Commissioner should be varied.

12 The Tribunal decided, in summary, as follows:

(a) In relation to the proper construction of s 38-385, the Tribunal concluded that ACN 154’s supplies of gold to the dealers were not the “first supply of that precious metal after its refining by … the supplier” within the meaning of s 38-385. Accordingly, it concluded that ACN 154’s supplies to dealers were *not* GST-free under s 38-385; they were, rather, input taxed supplies. It followed that ACN 154 was not entitled to claim the input tax credits of approximately $122 million in respect of its acquisitions of gold from suppliers.

(b) In relation to the Div 165 issue, although it was strictly unnecessary for the Tribunal to consider this issue, it considered the issue for the sake of completeness. The Tribunal concluded that: there was a “scheme” within the meaning of the relevant provisions; ACN 154 obtained a “GST benefit” from the scheme (namely, input tax credits of approximately $73 million); and the dominant purpose or principal effect of the scheme, having regard to relevant matters, was to obtain the input tax credits. Accordingly, had it been necessary to decide the point, the Tribunal would have upheld the assessments on this basis to the extent of approximately $73 million.

(c) In relation to penalties, the Tribunal did not alter the penalties imposed by the Commissioner.

13 Accordingly, the Tribunal affirmed the decisions under review.

14 ACN 154 states nine questions of law, and relies on 34 grounds in its further amended supplementary notice of appeal (**notice of appeal**). Although there is a question whether all of the questions and grounds raise a “question of law”, the principal issues that arise on the appeal can be summarised as follows:

(a) In relation to the operation of the GST Act apart from Div 165:

(i) whether the Tribunal erred in its construction of s 38-385 of the GST Act and in making certain related findings (the **construction issue**); and

(ii) whether the Tribunal erred in affirming the assessments in their entirety (the **calculation issue**).

(b) In relation to Div 165:

(i) whether the Tribunal denied ACN 154 procedural fairness in making certain findings; in particular, whether the Tribunal denied ACN 154 procedural fairness in the Tribunal’s reliance on three documents, which had not been the subject of cross-examination or submissions (the **procedural fairness issue**);

(ii) whether the Tribunal erred in law in its reliance on the failure of ACN 154 to call certain witnesses (the **witness issue**);

(iii) whether there was ‘no evidence’ for certain findings made by the Tribunal (the **no evidence issue**); and

(iv) whether the Tribunal otherwise erred in law in its application of Div 165.

(c) In relation to penalties, whether the Tribunal erred in law.

15 The following is a summary of our conclusions:

(a) In relation to the construction issue, we have concluded that the Tribunal erred in its construction of s 38-385. In our view, on the proper construction of s 38-385, ACN 154’s supplies of gold to the dealers constituted the “first supply of that precious metal after its refining by … the supplier”. They were, therefore, GST-free supplies and not input taxed supplies. In relation to the calculation issue, it is too late for ACN 154 to raise this issue in the context of this appeal. It follows from our conclusion in relation to the construction issue that, subject to the operation of Div 165, ACN 154 is entitled to input tax credits totalling $122,112,065 in respect of its acquisitions of scrap gold from the suppliers.

(b) In relation to Div 165 of the GST Act, we have concluded that the Tribunal denied ACN 154 procedural fairness in its reliance on the three documents as a basis for adverse findings of knowledge of certain matters on the part of ACN 154. Those findings were integral to the Tribunal’s consideration of whether Div 165 operates. It follows that the Tribunal’s decision must be set aside and the issue re-determined. The matter should be remitted to the Tribunal (differently constituted) for redetermination of whether Div 165 operates.

(c) In relation to penalties, we do not consider any question of law to arise.

## Key legislative provisions

16 The key relevant provision of the GST Act are as follows. The relevant version of the GST Act is that in force during the relevant period (1 February 2012 to 30 June 2014). It does not appear that there were any material amendments during that period. For ease of expression, we will refer to the provisions of the GST Act in present tense, even though we are referring to the provisions as they stood during the relevant period.

17 Under s 7-1(2) of the GST Act, entitlements to input tax credits relevantly arise on “creditable acquisitions”.

18 Section 9-30 is headed “Supplies that are GST-free or input taxed”. Section 9-30(1) provides that a supply is *GST-free* if (relevantly) it is GST-free under Div 38 or under a provision of another Act. Section 9-30(2) provides that a supply is *input taxed* if (relevantly) it is input taxed under Div 40 or under a provision of another Act. Under the GST Act, if a supply is input taxed, no GST is payable on the supply, and there is no entitlement to an input tax credit for anything acquired or imported to make the supply.

19 Section 9-30(3) addresses the situation where a supply would otherwise be considered to be both GST-free and input taxed. The subsection provides that, to the extent that a supply would, apart from the subsection, be both GST-free and input taxed:

(a) the supply is GST-free and not input taxed, unless the provision under which it is input taxed requires the supplier to have chosen for its supplies of that kind to be input taxed; or

(b) the supply is input taxed and not GST-free, if that provision requires the supplier to have so chosen.

20 Division 11 of the GST Act deals with creditable acquisitions. In s 11-1 it is explained that a taxpayer is entitled to input tax credits for the taxpayer’s *creditable acquisitions*. Section 11-5 defines a “creditable acquisition” as follows:

**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.

21 The expression “creditable purpose” is defined in s 11-15, which relevantly provides:

**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.

(2) However, you do not acquire the thing for a creditable purpose to the extent that:

(a) the acquisition relates to making supplies that would be \*input taxed; or

(b) the acquisition is of a private or domestic nature.

Thus, if an acquisition relates to making supplies that would be *input taxed*, the taxpayer does not acquire the thing for a creditable purpose.

22 Section 11-20 deals with *who* is entitled to input tax credits for creditable acquisitions. It provides that the taxpayer is entitled to the input tax credit for any creditable acquisition that the taxpayer makes.

23 Section 11-25 deals with the amount of the input tax credits for creditable acquisitions. Generally, the amount of the input tax credit for a creditable acquisition is an amount equal to the GST payable on the supply of the thing acquired. However, the amount of the input tax credit is reduced if the acquisition is only partly creditable.

24 Division 38 is headed “GST-free supplies”. It is explained in s 38-1 that, if a supply is GST-free: no GST is payable on the supply; and an entitlement to an input tax credit for anything acquired or imported to make the supply is not affected. Subdivision 38-L is headed “Precious metals” and comprises one section, s 38-385. That section provides:

**38-385 Supplies of precious metals**

A supply of \*precious metal is ***GST-free*** if:

(a) it is the first supply of that precious metal after its refining by, or on behalf of, the supplier; and

(b) the entity that refined the precious metal is a \*refiner of precious metal; and

(c) the \*recipient of the supply is a \*dealer in precious metal.

Note: Any other supply of precious metal is input taxed under section 40-100.

25 The expression “precious metal” is defined in s 195-1 as follows:

***precious metal*** means:

(a) gold (in an investment form) of at least 99.5% fineness; or

(b) silver (in an investment form) of at least 99.9% fineness; or

(c) platinum (in an investment form) of at least 99% fineness; or

(d) any other substance (in an investment form) specified in the regulations of a particular fineness specified in the regulations.

It should be noted that, while paragraph (a) of the definition of “precious metal” refers to gold in an investment form of at least *99.5%* fineness, the present case generally concerns gold of at least *99.99%* fineness (four nines gold).

26 A “refiner of precious metal” is defined in s 195-1 as “an entity that satisfies the Commissioner that it regularly converts or refines precious metal in carrying on its enterprise”.

27 A “dealer in precious metal” is defined in s 195-1 as “an entity that satisfies the Commissioner that a principal part of carrying on its enterprise is the regular supply and acquisition of precious metal”.

28 The expression “investment form”, which is used in the definition of “precious metal”, is not defined in the GST Act. As noted at [30] of the Tribunal’s reasons, the Commissioner articulated a definition in *GSTR 2003/10: Goods and Services Tax: What is ‘precious metal’ for the purposes of GST?* That document stated at [29]:

… for gold, silver or platinum to be in an investment form for the purposes of the GST Act, it must be in a form that:

* is capable of being traded on the international bullion market, that is, it must be a bar, wafer or coin;
* bears a mark or characteristic accepted as identifying and guaranteeing its fineness and quality; and
* is usually traded at a price that is determined by reference to the spot price of the metal it contains.

It was common ground before the Tribunal that the above view of what constitutes “investment form” was generally accepted; the parties also agreed that, absent a recognised mark and indication of fineness, a gold bar will not be “precious metal” irrespective of its degree of metallic purity: see the Tribunal’s reasons, [31].

29 Division 40 is headed “Input taxed supplies”. Subdivision 40-D is headed “Precious metals” and comprises only one section, s 40-100. That section provides:

**40-100 Precious metals**

A supply of \*precious metal is ***input taxed***.

Note: If the supply is the first supply of precious metal after refinement, the supply is GST-free under section 38-385.

30 To the extent that there is inconsistency between s 38-385 and s 40-100, this is resolved by s 9-30(3), referred to above. The effect of that provision is that, if a supply of precious metal falls in s 38-385, it will be GST-free rather than input taxed.

31 Division 165 of the GST Act contains anti-avoidance provisions. As explained in s 165-1, the object of the Division is to deter schemes to give entities benefits by reducing GST, increasing refunds or altering the timing of payment of GST or refunds.

32 Section 165-5 deals with when Div 165 operates. It provides in part:

**165-5 When does this Division operate?**

*General rule*

(1) This Division operates if:

(a) an entity (the ***avoider***) gets or got a \*GST benefit from a \*scheme; and

(b) the GST benefit is not attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the \*GST law, the \*wine tax law or the \*luxury car tax law; and

(c) taking account of the matters described in section 165-15, it is reasonable to conclude that either:

(i) an entity that (whether alone or with others) entered into or carried out the scheme, or part of the scheme, did so with the sole or dominant purpose of that entity or another entity getting a \*GST benefit from the scheme; or

(ii) the principal effect of the scheme, or of part of the scheme, is that the avoider gets the GST benefit from the scheme directly or indirectly; and

(d) the scheme:

(i) is a scheme that has been or is entered into on or after 2 December 1998; or

(ii) is a scheme that has been or is carried out or commenced on or after that day (other than a scheme that was entered into before that day).

33 The expressions “GST benefit” and “scheme” are defined in s 165-10 as follows:

**165-10 When does an entity get a *GST benefit* from a scheme?**

(1) An entity gets a ***GST benefit*** from a \*scheme if:

(a) an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme; or

(b) an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme; or

(c) all or part of an amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, payable later than it would have been apart from the scheme or a part of the scheme; or

(d) all or part of an amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, payable earlier than it would have been apart from the scheme or a part of the scheme.

*What is a* ***scheme****?*

(2) A ***scheme*** is:

(a) any arrangement, agreement, understanding, promise or undertaking:

(i) whether it is express or implied; and

(ii) whether or not it is, or is intended to be, enforceable by legal proceedings; or

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

*GST benefit can arise even if no economic alternative*

(3) An entity can get a \*GST benefit from a \*scheme even if the entity or entities that entered into or carried out the scheme, or a part of the scheme, could not have engaged economically in any activities:

(a) of the kind to which this Act applies; and

(b) that would produce an effect equivalent (except in terms of this Act) to the effect of the scheme or part of the scheme;

other than the activities involved in entering into or carrying out the scheme or part of the scheme.

34 Section 165-15 sets out matters to be considered in determining purpose or effect:

**165-15 Matters to be considered in determining purpose or effect**

(1) The following matters are to be taken into account under section 165-5 in considering an entity’s purpose in entering into or carrying out the \*scheme from which the avoider got a \*GST benefit, and the effect of the scheme:

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme; and (ii) the economic and commercial substance of the scheme;

(c) the purpose or object of this Act, the *Customs Act 1901* (so far as it is relevant to this Act) and any relevant provision of this Act or that Act (whether the purpose or object is stated expressly or not);

(d) the timing of the scheme;

(e) the period over which the scheme was entered into and carried out;

(f) the effect that this Act would have in relation to the scheme apart from this Division;

(g) any change in the avoider’s financial position that has resulted, or may reasonably be expected to result, from the scheme;

(h) any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a ***connected entity***) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature;

(i) any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out;

(j) the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm’s length;

(k) the circumstances surrounding the scheme;

(l) any other relevant circumstances.

(2) Subsection (1) applies in relation to consideration of an entity’s purpose in entering into or carrying out a part of a \*scheme from which the avoider gets or got a \*GST benefit, and the effect of part of the scheme, as if the part were itself the \*scheme from which the avoider gets or got the GST benefit.

35 Section 165-40(a) (s 165-40(1)(a) from 1 July 2012) provides that, for the purpose of negating a GST benefit, the Commissioner may make a declaration stating (relevantly) the amount that is (and has been at all times) the avoider’s net amount for a specified tax period that has ended.

36 Section 165-40(2) (which commenced on 1 July 2012) requires the Commissioner to take such action as he or she considers necessary to give effect to a declaration made under the section.

## Background facts

37 The following summary of the background facts is substantially based on the background facts set out at [36]-[98] of the Tribunal’s reasons. Save in relation to the calculation issue, and in one other minor respect (relating to a finding that certain processes were for the purpose of “quality control”), there is no challenge to these background facts as stated by the Tribunal.

### ACN 154’s board of directors

38 ACN 154 was incorporated on 29 November 2011.

39 At all material times, ACN 154 had four directors. Two of the directors were Phillip Cochineas and Andrew Cochineas, who are brothers. (Consistently with the Tribunal’s reasons, we will refer to Phillip Cochineas as “Mr Cochineas” and Andrew Cochineas by his full name.) Together with their associates, they indirectly owned 50% of ACN 154 through interposed entities. Mr Cochineas and his associates also owned and controlled Palloys Pty Ltd and its related entities (**Palloys**). The Palloys group was involved in jewellery production and included AGS Metals Pty Ltd (**AGS Metals**), which had a Brisbane office, and PJ Williams and Associates (**PJ Williams**), a Melbourne-based business.

40 Mr Cochineas was the managing director of ACN 154’s business from the date of its incorporation to 31 August 2015, when ACN 154 ceased trading.

41 At all material times, Jane Simpson and her father, Francis Gregg, were also directors of ACN 154. Ms Simpson and Mr Gregg controlled a company named Fraja Pty Ltd that owned 50% of ACN 154. Ms Simpson and Mr Gregg were also directors of Australian Bullion Company (NSW) Pty Ltd (**ABC NSW**). It was not in dispute before the Tribunal that ABC NSW was a “dealer in precious metal” for the purposes of the GST Act. The trading name of ABC NSW was at all relevant times “ABC Bullion”.

### The joint venture between ABC NSW and Palloys

42 ACN 154 was formed as a joint venture between ABC NSW and Palloys to acquire an existing assaying, refining and precious metals manufacturing business known as the “JSPL Business”. Until that time, that business had operated as a *toll refinery*. A toll refinery refines scrap metal for other businesses on contract. It charges a fee for its refining services. The toll refiner does not acquire the metal it refines, nor does it sell the output. It provides a service and delivers the refined product back to the owner.

43 Mr Cochineas and his associates proposed a business model for ACN 154 that was different from that of the JSPL Business. Their business model combined the assets of the existing JSPL Business and elements of their other Palloys businesses, together with their industry contacts, experience, access to capital and know-how.

44 The arrangement between ABC NSW and Palloys was contemplated as early as 20 May 2011, according to minutes of a meeting titled “Project Goldfinger” held on that day (the **Goldfinger Minutes**). The meeting was attended by Ms Simpson, Mr Gregg, Mr Cochineas and Andrew Cochineas. The Goldfinger Minutes recorded that a special purpose company (ultimately ACN 154), owned equally by ABC NSW and Palloys, would be incorporated to acquire the JSPL Business. ABC NSW would provide ACN 154 with an interest-bearing gold and silver loan, and Palloys would provide daily management services for a fee. According to the Goldfinger Minutes, ACN 154 would develop an advanced assaying laboratory with the industry’s fastest turnaround. The plan contemplated ABC NSW and Palloys directing all their refining work to ACN 154. It was also anticipated ACN 154 would exclusively produce ABC hallmarked bullion bars and own the intellectual property in the ABC hallmark. ACN 154 would focus on refining scrap of at least 18 karats (that is, metal with a fineness of at least 75%). It would send all other scrap metal with lesser fineness to different refiners. One of these refiners was Produits Artistiques Métaux Précieux (**PAMP**), which is a London Bullion Market Association (**LBMA**) accredited Swiss refiner. ABC NSW was at all relevant times the exclusive Australian distributor of PAMP bars.

45 There is a distinction between primary refining material and secondary refining material. “Primary refining material” refers to gold that is sourced directly from mines; “secondary refining material” refers to existing material such as jewellery and recycled gold from various users. The joint venturers expected it would be easier to enter and disrupt, if not dominate, the *secondary refining* sector of the gold market given their business model, existing relationships with third parties who would become key suppliers of the refinery, and experience in the precious metal industry.

46 Attached to Mr Cochineas’s first affidavit filed in the Tribunal proceeding was the “Project Goldfinger Term Sheet” dated 1 September 2011 which, among other things, set out the services to be provided by ACN 154 after it was established. The document stated that ACN 154 was to develop a state-of-the-art assaying laboratory with the fastest turnaround in the industry, and was “to perform refining services in its own right and also for ABC and Palloys”. It was also stated that, generally, ACN 154 “is to assay only and send all melted scrap to PAMP or other refinery” with ABC NSW to arrange preferential rates for ACN 154. “Only 18ct+ scrap to be refined at [ACN 154]”, the document explained.

47 On or about 30 November 2011, ABC NSW and Palloys entered into a Shareholders’ Agreement (a draft of which was in evidence before the Tribunal). The Tribunal noted that the Shareholders’ Agreement was extensively discussed with Ms Simpson and that Ms Simpson sought her own independent legal advice for ABC NSW from another law firm, as revealed from the following extracts of a lawyer’s email to Ms Simpson dated 17 October 2011:

… my understanding of the EBS Palloys deal is as follows (please let me know if I have any of this wrong);

EBS currently operates a gold refining business. There are other aspects to the EBS business but you are only interested in the assaying/refining/barring aspects (“Business”).

You [ABC NSW] and Palloys (in partnership, on a 50/50 basis) wish to acquire the Business and have already established “Newco” to conduct the Business. **A significant motivation is to obtain the benefit of the current GST-free “first supply from a refinery” exemption.**

In other words, you will be able to have gold refined and barred by Newco with the “ABC Refining” mark. Those bars (I assume) will then be marketed by you and/or your network of distributors under your standard distribution agreement.

Similarly, Palloys will channel all its assaying/refining/barring business through Newco.

…

6. Under clause 6.3, ABC is obliged to “loan” precious metals to the Group pursuant to “Loan Agreements”. You didn’t mention anything about gold loans. Not sure what this is all about?? It’s one thing for the Company to be providing services; it’s another for it to be “owning” gold??

(Emphasis added.)

48 Ms Simpson replied to the above email on the same day. Her reply included:

Newco has to have the use of gold to conduct the refinery – that is the whole basis for the business model we are proposing. In most instances, Newco will only be assaying gold – the actual refining will be occurring in Switzerland at PAMP. What will happen is that Newco will assay a client’s gold and then pay out on the basis of the assay i.e. Newco will not wait for the actual refining to have taken place. In this regard, the gold provided as the gold loan will be used to pay out the customer.

### ACN 154’s operations

49 On 1 February 2012, ACN 154 acquired the JSPL Business and commenced refining operations (notwithstanding initial plans for a more limited operation). The Tribunal noted that the Commissioner did not dispute that ACN 154 was a “refiner of precious metal” as defined in s 195-1 of the GST Act, and the Tribunal found that to be the case.

50 From February 2012, ACN 154 traded as “EBS & Associates” and described its business to the Commissioner as involving the acquisition and refining of scrap and other metal in order to produce precious metal for sale to dealers.

51 ACN 154 accounted for GST on a monthly basis. It lodged its first business activity statement for the monthly tax period ended 29 February 2012.

52 As a general refiner (as distinct from a toll refiner), ACN 154 acquired scrap gold on its own account; the scrap gold was converted or refined into precious metal, that is, gold bullion in investment form, that ACN 154 planned to sell GST-free to dealers in precious metal, including ABC NSW.

53 In his evidence before the Tribunal, Mr Cochineas confirmed that the investors in the new business were conscious from the outset of the importance of adhering to the requirements of the GST Act for the making of GST-free supplies. Mr Cochineas annexed a document to his first affidavit that was described as a “Policy Document” prepared in early 2012 in conjunction with Ms Simpson, among others. The Policy Document explained ACN 154’s plans to ensure the new venture was able to be classified as a “refiner” pursuant to the GST Act to be able to deliver GST-free supplies of bullion onto the market. The Policy Document relevantly canvassed whether ACN 154 was a refiner under the GST Act by reference to the definition of the term “refiner of precious metal” in s 195-1 and the meaning of “precious metal”, also defined in s 195-1. The document also considered whether ACN 154 was a “recycler” according to the GST Act, although there was no such term in the GST Act.

54 Philip Williams, a chemist who had sold his Melbourne-based business named “P J Williams” to AGS Metals, was engaged by ACN 154 (and other entities in the Palloys group) to provide metal consultancy services. Mr Williams gave evidence for ACN 154 in the Tribunal proceeding. He explained that he had been engaged by ACN 154 to review the JSPL Business operations when they were acquired by ACN 154. He recommended upgrades to the existing plant to make it an all-service refinery. He also recommended the acquisition of plant including additional furnace capacity, fume cupboards and scrubbers. Mr Williams recalled those recommendations being made in mid-2012. He said improvements were made over time. He referred, in particular, to the acquisition of a new, much larger furnace which would enable the refinery to melt material more efficiently. Mr Williams said the capacity of the aqua regia plant was increased between early 2012 and April 2013 with the addition of fume cupboards. (Aqua regia refining is a process by which scrap gold is melted and cast into flaky granules, which are then dissolved in a mixture of nitric and hydrochloric acids. The dissolved mixture is then reacted with sodium sulphite to selectively precipitate pure gold as a fine powder, which is filtered, washed, dried, melted and granulated.) Mr Williams also recalled up to 30 employees were working in the refinery by April 2013. The workforce comprised a chief chemist and an assistant, one to two people working in the aqua regia area, three to four people in the furnacing and smelting area, ten people in the barring area and three to four people in the vault. There were another six to eight people in administration.

55 The majority of the scrap gold supplied to ACN 154 during the relevant period was already of at least 99.99% fineness. It followed that some of the refinery processes were not engaged, or were not engaged to the same extent as they would have been if ACN 154 had been refining scrap gold that was less than 99.99% fineness. As Mr Williams explained, a refiner of material that was already at or close to 99.99% fineness could rely on a pyrometallurgical process (like smelting and fluxing) rather than having to resort to other processes (like aqua regia refining or chlorination) that were typically used to achieve an increase in the fineness of gold that was less than 99.5% fineness.

56 Put simply, it is quicker, easier and cheaper for the refinery to work with material that has already been refined to the point of fineness expected of investment-grade bullion. The Tribunal noted that that was just as well, given the evidence from Mr Williams that the plant and equipment available when the refinery was acquired by ACN 154 at the start of 2012 was not capable of processing large amounts of low-grade material. The Tribunal stated that that capacity did not appear to be substantially increased even after the investment in plant and staff resources that occurred in 2012-2013.

57 Mr Cochineas confirmed, under cross-examination, that low-grade scrap was diverted to PAMP. Mr Cochineas acknowledged PAMP was an “overflow or external refiner” that could be (and was) used for all types of scrap material. He also agreed, under cross-examination, that ACN 154 preferred to send PAMP low-grade material. He said that was because of the prohibitive cost of transporting higher grade scrap. The Tribunal stated that his evidence on this point was consistent with the evidence given by Mr Williams and another metallurgist, Stephen Lowden. Mr Lowden was also employed by AGS Metals. He assisted ACN 154 as a metallurgist from time to time. Mr Lowden, who gave evidence for ACN 154 before the Tribunal, said ACN 154 was unable to refine jewellery that included three or more metals in the amalgam. For those jobs, he explained, one needed to use a “full metal refiner” like PAMP rather than a “two metal refiner” like ACN 154.

58 The Tribunal found that ACN 154’s gross margin in respect of its refining business was primarily derived from the difference between the price at which it bought the fine metal content in scrap from its suppliers and the price at which it sold the finished product as precious metal, namely, investment-grade bullion, to dealers. It also earned some fees from refining, assaying and barring. There was no suggestion ACN 154 had other income sources, and it did not make a significant amount from toll refining. The Tribunal stated that the fact the refinery process could be made more efficient by economising on processes calibrated to deal with relatively pure scrap worked to the benefit of ACN 154 and its joint venturers, who were interested in capturing more of the value of the production process.

### ACN 154’s funding and payment arrangements

59 ACN 154’s funding arrangements were an integral feature of its business model. Whereas the former refining business it acquired had operated as a toll refiner, ACN 154 was in the business of *acquiring* scrap gold and then *selling* the finished product. Quite apart from any capital required to effect process improvements by hiring staff and acquiring and upgrading plant and equipment, it needed working capital to fund its trading. To that end, the joint venturers agreed in the Shareholders’ Agreement to provide metal and general finance loans to assist ACN 154 to make acquisitions of scrap. ACN 154 also obtained an overdraft facility from a bank that initially provided $3 million in credit. The facility was extended to $10 million by June 2013. But the increase in turnover and the stable relationships with suppliers of scrap gold and dealers in precious metal also created, the Tribunal found, a “kind of virtuous cycle”. Mr Cochineas pointed out ACN 154’s ability to acquire scrap gold from a regular supplier and sell the finished product to a regular dealer almost simultaneously reduced the risk associated with volatility and “acted as a natural hedge against pricing risk inherent in precious metal trading”. That innovation eliminated the need for costly external hedging facilities and improved cashflow.

60 The payment arrangements ACN 154 offered to suppliers were described by Mr Cochineas, in his evidence before the Tribunal, as follows:

A key strategy to drive Refining Material to [ACN 154] rather than its Australian competitors was to institute a system of fast payment to suppliers of Refining Material based upon preliminary testing of that Refining Material by [ACN 154] or sometimes by the supplier itself. I was aware that this system was a common international industry practice but prior to the advent of [ACN 154] I had formed the view based on my investigations of the Australian gold refining industry that it was not widely practised by Australian refiners.

61 Mr Cochineas said that strategy was essential to ACN 154’s success because it gave the refinery’s clients “a significant cashflow advantage and a point of difference compared to doing business with [ACN 154’s] Australian competitors”. He said the payment practices were common overseas, so he knew the plan was workable, but it was not common in Australia in 2012. Mr Cochineas explained ACN 154’s principal competitor at the time took up to three weeks to make financial settlement with its clients. ACN 154, in contrast, paid a supplier once the scrap was in the physical possession of ACN 154 or in the physical possession of its supplier (also referred to as a client of ACN 154). That practice was important because many suppliers (or clients) would not ship the scrap to ACN 154 until they were paid. The ongoing relationships between ACN 154 and various suppliers meant it was easier to adjust a supplier’s account if there was variation between the results of the preliminary analysis and the results returned from the more detailed assay and laboratory testing.

### ACN 154’s turnover

62 ACN 154’s turnover increased dramatically during the relevant period. In the last five months of the 2012 financial year, when ACN 154 took over the JSPL Business, the turnover was $63,278,865. In the 2013 financial year, ACN 154’s turnover surged to $594,838,536. In the 2014 financial year, ACN 154’s turnover increased to $745,785,032, although the growth was affected by attention from the authorities during that period (discussed below). Turnover decreased to $654,159,601 in the 2015 financial year.

### The supply of refinery material to ACN 154

63 ACN 154 entered ongoing relationships with a few entities that regularly supplied large quantities of scrap gold. In his evidence before the Tribunal, Mr Cochineas deposed that ACN 154 went through a process of due diligence and ‘on-boarding’ with each of the suppliers and negotiated terms on an individual basis. Some of the suppliers had previously dealt with one of the joint venturers, but it was agreed among the joint venturers that those entities should be encouraged to deal with ACN 154 after 2012.

64 As noted above, ACN 154 decided to focus – at least initially – on suppliers of secondary refining material. Mr Cochineas explained the material came in a number of different forms, including precious metal bars that were hallmarked and in investment form. Mr Cochineas said very few bars in the form of investment-grade bullion were acquired and, when they were, ACN 154 did not claim any input tax credits because the supplies to ACN 154 were not taxable supplies.

65 In his evidence before the Tribunal, Mr Cochineas confirmed ACN 154 was supplied with a larger number of damaged or defaced precious metal bars. These bars bore a hallmark, but they were cut, melted or otherwise damaged in a way that made them untradeable as “precious metal”. Some of the bars had been previously produced and hallmarked by ACN 154, but many of them were hallmarked by somebody else, including PAMP. Mr Cochineas said these bars were sold to ACN 154 by the third-party suppliers as taxable supplies on the basis they were not in investment form. That meant ACN 154 paid GST-inclusive prices for these acquisitions of scrap gold. Mr Cochineas added that ACN 154 claimed input tax credits in the usual way, just as it did for other acquisitions of things acquired for carrying on its enterprise. ACN 154 took the same approach to claiming input tax credits when it acquired other scrap gold including: metal blobs or slugs; metal granules; jewellery, jewellery scrap and jewellery by-products; and metal industrial by-products.

66 While some of the refining material was relatively impure, in the sense the scrap gold included numerous other metals which had to be separated during the refining process to create metal that was of 99.5% fineness or better, the greater portion of the secondary refining material supplied during the relevant period was at least 99.99% fineness. According to ACN 154’s laboratory analyses, around 22% of the material supplied during the period was less than 99.99% fineness gold. This meant that, on ACN 154’s calculations, around 78% of the scrap it acquired or received was already refined to the level of 99.99%. Some of that material – perhaps a great deal of it – was contaminated with non-metallic impurities like silicon. In some cases, those contaminants were introduced, perhaps unintentionally, by the suppliers.

67 In his evidence before the Tribunal, Mr Cochineas said that: some of the suppliers might have melted down gold bars or other material that was 99.99% fineness using primitive equipment in uncontrolled conditions; that process could introduce non-metallic contaminants (like silicates and borates) into the melted product; and those non-metallic contaminants had to be eliminated by ACN 154 as part of its processes, even if the product already had a high level of metallic purity.

68 The Tribunal noted at [80] that that evidence was tested during cross-examination, but the Tribunal stated that it did not understand there to be a dispute that 78% of the scrap gold was already at 99.99% fineness when it arrived in ACN 154’s refinery.

### ACN 154’s refining processes

69 In his evidence before the Tribunal, Mr Cochineas insisted that every piece of scrap gold received was melted down and subjected to the smelting and fluxing processes. He said that was the invariable practice, even where the scrap gold in question was defaced or damaged precious metal bars that bore a recognised hallmark confirming the bar was of 99.99% fineness. The Tribunal stated that the motivation behind that practice was clear from the evidence. No refinery, and certainly not ACN 154, was prepared to accept anybody else’s word for the purity of the product it acquired. Every refinery was worried about fraud. The material received always had to be melted and analysed for quality control purposes.

70 Fraud was not the only risk. A number of the suppliers melted down material they had on hand into blobs in an effort to conceal the source of that material. Mr Cochineas gave evidence that suppliers were concerned that if they revealed the sources who supplied them, the refiner might approach those sources directly and cut the supplier out of the process. That attempt to cover tracks had consequences, however. The melting often occurred in uncontrolled conditions and introduced impurities into the blobs that were not present before. Mr Cochineas pointed out material which had been inexpertly melted might also include an amalgam of different metals that were not spread consistently throughout the sample. Smelting and fluxing ensured all of the material supplied in a particular batch could be reduced to a homogenous amalgam that could then be properly sampled for its metallic purity.

71 The Tribunal found at [84] that the primary objective of the initial smelting and fluxing process was to provide quality assurance. (That finding is the subject of challenge in the appeal.) The Tribunal stated that: having melted the material, there was an opportunity to eliminate any non-metallic impurities that might be present, like silicates, borates, carbides, sulphides and other compounds of these materials; and the initial melt also permitted the refiner to identify and remove low-melting-point alloy metal like lead, zinc or tin. The Tribunal stated that: Mr Williams pointed out in his oral evidence that the very act of melting the gold in controlled circumstances in and of itself caused the gold to become purer; every time gold was melted, it increased its metallic fineness as silver and other metals were volatilised.

72 In his evidence before the Tribunal, Mr Cochineas described a few common processes that the refinery was capable of undertaking to reduce or eliminate metallic impurities and to remove non-metallic contaminants. Apart from primary smelting and fluxing, these processes include oxidation, dross extraction, and silver drenching. He explained these processes were carried out in a dedicated area of the refinery which was serviced by exhaust systems called scrubbers that collected fumes. Mr Cochineas said quantities of volatilised gold and silver were collected by the scrubbers over time. That material was fed back into the refining process in due course.

73 While the metal was still in a molten state, Mr Cochineas said it was standard practice to collect a dip sample that could be analysed by the metallurgical laboratory attached to the refinery. The dip sample was collected using a small glass pipette. The laboratory took four assays of every dip sample. The assay result was recorded in the laboratory and the dip samples were kept for three months. The assay result was also recorded on the job sheet, which could then be used to determine the final financial settlement with the supplier. This settlement was also known as the ‘out-turn’.

74 Mr Cochineas explained that, at the time of out-turn, ACN 154 was taken to purchase the total number of grams of fine metal content of the material supplied (that is, the number of grams of 99.99% fineness gold or other investment-grade metal that existed within the batch of molten material). The purchase price was determined by the terms agreed with each supplier but was generally calculated with reference to the prevailing spot price for the metal, less a discount and less any fees payable to ACN 154 by the supplier under the terms. The usual practice was that the price was recorded in a tax invoice created by the supplier in question or in a recipient-created tax invoice prepared by ACN 154. In some cases, Mr Cochineas explained, the grams of gold were simply credited to the supplier’s fine metal account with ACN 154. In either event, the molten gold sitting in the refinery became the property of ACN 154 at that point.

75 Once the metal had passed into ACN 154’s ownership, ACN 154 was free to subject the molten product to such other refining and manufacturing processes as it saw fit in order to extract the pure metal. Refinery employees were responsible for deciding what further refining processes should be used. Mr Cochineas said the options included further smelting and fluxing, aqua regia refining, chlorination refining, electrolytic refining, and electro-parting refining. These processes were undertaken selectively depending on the characteristics of the particular batch of molten material.

76 The Tribunal stated that it stood to reason that ACN 154’s processes would have been made somewhat easier (or at least less costly and time consuming) if the refining material had already been refined and was reliably of at least 99.99% fineness when received. The Tribunal stated that Mr Cochineas’s evidence left the impression – the Tribunal thought, by design – that all of the classic refining processes were available to be used on all of the scrap received into the refinery. However, the Tribunal considered that to be unlikely given the ongoing limitations on the refinery’s capacity and the fineness of the scrap gold ACN 154 was dealing with. The evidence of Mr Williams was that pyrometallurgical processes alone – that is, smelting and fluxing – were usually sufficient to increase the metallic fineness of gold by a few decimal points from, say, 99.8% or even 99.5% to at least 99.99%.

77 The Tribunal noted that Dr Stewart Murray, a metallurgist called by ACN 154 as an independent expert witness, made essentially this point during cross-examination. He explained that smelting and fluxing constituted a more efficient way to achieve small increases in fineness if that was all that was required compared to alternative approaches, like aqua regia refining. The Tribunal considered it unlikely ACN 154 would do more than what was required given that its business model prized quick turnaround and that the business worked with very tight margins.

78 The Tribunal found at [91] that: as the molten material was processed, the batches might be combined and subject to further assays and (if the batch included lower grade material) refining processes until ACN 154 was left with batches of 99.99% fineness gold; once the laboratory gave its approval, the material was granulated and placed into 5 kg bags; those bags of fine granule stock were undifferentiated in the sense it was no longer possible to determine the original source of the material; and when ACN 154 was ready, the fine granules were melted, poured into moulds and cast into bars that were inspected, hallmarked and readied for sale to dealers in precious metal.

### ACN 154’s supplies of precious metal to dealers

79 During the relevant period, ACN 154 supplied most of its precious metal to two companies, ABC NSW and Ainslie Bullion Company (**Ainslie**) (together, the **Dealers**), each being a “dealer in precious metal”, as defined in s 195-1 of the GST Act. In respect of the 2013 calendar year, approximately 63% of ACN 154’s customer receipts were from ABC NSW, with approximately 30% of customer receipts from Ainslie. As noted above, ABC NSW was associated with ACN 154. Ainslie was not related to ACN 154. All of the bullion sold by ACN 154 to the Dealers was on the basis it was GST-free. That means ACN 154 did not charge GST to the Dealers and it claimed to be entitled to its input tax credits for the GST charged to it by suppliers with respect to its acquisitions of scrap gold.

80 ACN 154 and ABC NSW had interests in common. ACN 154 depended on ABC NSW to place orders for precious metal as it was one of very few dealers to which ACN 154 sold its precious metal. ABC NSW relied on ACN 154 to manufacture and supply it with investment-grade bullion so that ABC NSW could make supplies to its customers. The closeness of the relationship and the predictability of their interaction helped smooth the operation of ACN 154’s business.

### Summary

81 The Tribunal found at [94] that: ACN 154 was a refiner of precious metal and it acquired a large volume of scrap gold from a relatively small pool of suppliers as part of a business strategy that targeted suppliers of secondary refining material; ACN 154 and/or its joint venturers were familiar with many of the main suppliers; indeed, some of the main suppliers were directed to ACN 154 by one of its founding investors, ABC NSW, in order to increase turnover at the refinery. The Tribunal found that ACN 154 did not always know where the suppliers sourced their material because suppliers tended to be secretive for reasons of their own. Having said that, the Tribunal also found that ACN 154 knew that a few of its main suppliers were sourcing material from ABC NSW in particular, and that a proportion of the material delivered to ACN 154 was in the form of damaged bars or in other forms which were likely to have been comprised of gold that had been in investment form but which had been melted to disguise its provenance.

82 The Tribunal found at [95] that at least 78% of the material acquired by ACN 154 from the suppliers was 99.99% fineness at the time of acquisition. The Tribunal also found that some of that material might have been supplied in a form that included non-metallic contaminants that had to be removed before the material was transformed into investment-grade bars that were hallmarked and ready for sale by ACN 154 to the Dealers.

83 The Tribunal found at [96] that ACN 154 invariably subjected the material it received from its suppliers to smelting and fluxing processes as part of its quality-control process, but this pyrometallurgical process was not conducted for the purpose of making material it knew had a metallic purity of at least 99.99% into a product that was more than 99.99% fineness. The Tribunal stated that the very act of melting the scrap gold in controlled circumstances by ACN 154 might incidentally increase the metallic purity of the material, but the Tribunal did not accept that that was the purpose of the initial melt in every case. Instead, the Tribunal stated, the purpose was to provide quality assurance and facilitate the efficient production of investment-grade bullion, namely, gold bars of at least 99.5% fineness, in an investment form, for supply to the dealers in precious metal.

84 It is unclear how much of the scrap material identified as being of at least 99.99% fineness was subjected to additional refining processes (such as aqua regia refining) as opposed to merely processing the molten material into standardised batches that could be granulated and cast into precious metal bars. ACN 154 had the incentive and intention to limit the time-consuming, finicky and costly refining processes (like aqua regia refining) as opposed to the routine pyrometallurgical and manufacturing processes that could be used to create the finished product.

### The warrants, the audits and the assessments

85 In his evidence before the Tribunal, Mr Cochineas said the Australian Federal Police (**AFP**) executed search warrants at ACN 154’s premises as well as the premises of ABC NSW on 29 October 2013. He said the warrants were issued in connection with an investigation of third parties. Documents were seized from ACN 154 and the contents of some of its computer systems were also downloaded. Mr Cochineas said some of ACN 154’s suppliers of scrap gold had their bank accounts frozen by the Commissioner. It became impossible to continue dealing with those entities. Mr Cochineas said ACN 154 voluntarily ceased dealing with some suppliers that were unwilling or unable to supply declarations to ACN 154 confirming their compliance with the GST laws. The investigation and other regulatory activity also created bad publicity which started to affect ACN 154’s trade.

86 The Commissioner began to conduct more GST compliance activity in relation to ACN 154’s business, which impacted on its operations and relationships. The Commissioner retained refunds claimed in ACN 154’s business activity statements for October and November 2013 for verification. The questions over the claims for input tax credits and the delay in paying the GST refund caused ACN 154 to become more cautious in its payment strategies. That new-found caution appears to have caused some of the suppliers to move their business away from ACN 154. While Mr Cochineas said the Commissioner completed the audit of those particular business activity statements and paid a GST refund to ACN 154 on 13 December 2013, further GST audits followed. In particular, a more detailed and extensive audit was launched by the Commissioner on 8 July 2014. Mr Cochineas said ACN 154’s business did not change in any substantive way during the periods covered by the GST audits, and it continued to claim input tax credits of over $40 million during the 2015 financial year.

87 On 8 April 2016, the Commissioner issued notices of assessment and notices of amended assessment of net amount disallowing certain input tax credits claimed by ACN 154 in its business activity statements in the relevant period totalling $122,112,065. The Commissioner also issued declarations and issued alternative notices of assessment negating input tax credits claimed by ACN 154 in its business activity statements in the relevant period totalling $72,953,611. On the same day, the Commissioner also issued notices of assessment of administrative penalties totalling $58,059,829.75 in relation to the GST shortfall for the relevant period. ACN 154 objected on 28 April 2016 and the Commissioner disallowed ACN 154’s objections in their entirety on 21 September 2016. ACN 154 applied to the Tribunal for review of the objection decisions on 18 November 2016.

## The proceeding in the Tribunal

88 The documents lodged by the Commissioner (the **T-Documents**) in the Tribunal proceeding exceeded 44,000 documents, with more than 60,000 pages in total: see the Tribunal’s reasons, [11]. At the start of the hearing before the Tribunal, the parties tendered an agreed hearing book comprising ten folders of materials. By the conclusion of the hearing, some 13 days later, the hearing book had expanded to 13 folders; the Tribunal was also presented with 29 exhibits. The Tribunal stated that documents that were not relied on by the parties were, by consent, removed from the final form of the hearing book (the **Hearing Book**).

89 In relation to Div 165 of the GST Act, the Commissioner relied in the Tribunal proceeding upon a wider scheme or, in the alternative, a narrower scheme or schemes.

90 The alleged wider scheme (as set out in the Tribunal’s reasons at [237]) was as follows:

(a) the supply by the applicant to ABC NSW and Ainslie (the **Dealers**) of gold of 99.99% fineness in investment form for an amount roughly equivalent to the prevailing spot price for gold;

(b) the purchase by the **Intermediaries** from the Dealers and/or other sources of gold of 99.99% fineness in investment form;

PARTICULARS

This step consisted of the purchase of precious metal by:

(i) the IPJ Group entities from ABC NSW and/or other sources;

(ii) the Majid Group entities from Ceylon and/or other sources;

(iii) MAK from YPP, USH and/or other sources;

(iv) YPP from Ainslie and/or other sources;

(v) Australian Bullion Company (Aust) Pty Ltd (ABC(A)) from ABC NSW and/or other sources;

(vii) USH from ABC(A) and/or other sources.

(c) the scratching, melting or altering of the gold referred to in paragraph (b) above such that, while still of 99.99% fineness, the gold was no longer in investment form for the purposes of the definition of ‘precious metal’ in s 195-1 of the GST Act;

PARTICULARS

This step consisted of the scratching, melting or altering of precious metal by the IPJ Group entities, the Majid Group entities (or Mr Faraj), Gold Buyers (or Mr Faraj), MAK, YPP/ Mr Bourke, USH/Mr Calabrese and/or ABC(A).

(d) the supply of the gold referred to in paragraph (c) by the Division 165 Supplying Entities to the applicant for an amount that was less than the prevailing spot price for gold, before the addition of GST; and

PARTICULARS

This step consisted of the sales to [the applicant] of non-precious metal by the IPJ Group entities, the Majid Group entities (by Mr Faraj purportedly on their behalf), Gold Buyers (to the extent they were made by Mr Faraj purportedly on their behalf) and MAK. In relation to MAK, the gold it sold to the applicant was obtained by it from YPP/Mr Bourke and USH/Mr Calabrese.

(e) the refining by the applicant of the gold referred to in paragraph (d) to produce ‘precious metal’ as defined.

(Footnote omitted.)

91 The expression “Division 165 Supplying Entities” (used in paragraph (d) of the alleged wider scheme) referred to:

(a) five related entities controlled by Adrian Catanzariti (**Mr Catanzariti**), namely Italian Prestige Jewellery Pty Ltd, Premium Metal Service Pty Ltd, Antel Metals Pty Ltd, 4 Nines Pty Ltd and A1 Metals Pty Ltd (together, the **IPJ Group**);

(b) a group that was constituted by various entities on whose behalf Majid Faraj purported to act, being entities that traded under the following names: Majid Jewellers; Najaf Jewellers; Elmas Jewellers; Menas Jewellery; KLM Jewellery; Blue Heaven Jewellery; Kais Jewellery, Mazin Jewellery, Sahara Jewellery and Mario B Jewellery (together, the **Majid Group**);

(c) Australian Gold Buyers International Pty Ltd (**Gold Buyers**); and

(d) M.A.K. Precious Metals Pty Ltd (**MAK**).

92 The expression “Intermediaries” (used in paragraph (b) of the alleged wider scheme) referred to the IPJ Group, Gold Buyers, the Majid Group, MAK and Australian Bullion Company (Australia) Pty Ltd, which in turn sold gold bars to United Soul Holdings (**USH**), together with certain other persons to whom one or more of them sold gold, including Focus Metals Pty Ltd, Gold Makers of Australia Pty Ltd and Goldborough.

93 The Commissioner relied in the alternative on a narrower scheme that consisted of the transactions and courses of action referred to in paragraphs (b), (c) and (d) of the alleged wider scheme: see the Tribunal’s reasons, [238].

94 The Commissioner’s broad case (as summarised in the Tribunal’s reasons at [239]) was as follows:

Broadly, the Commissioner explained that the scheme required the participation of a refiner, here the applicant, that would acquire the scrap gold to make supplies of precious metal. The refiner could not be a toll refiner (as was the main business of the JSPL Business when it was acquired by the applicant), as toll refining involves the supply of services not the supply of goods. The Commissioner further submitted that the purpose of defacing the precious metal that was acquired from the Dealers into non-investment form precious metal, which was an integral step in both the wider and narrower schemes, was fundamental to the scheme as it enabled the Division 165 Supplying Entities to make taxable supplies to the applicant such that it would pay the higher GST-inclusive prices to the Division 165 Supplying Entities. In this way, the making of taxable supplies to the applicant enlivened the entitlement to claim input tax credits. The Commissioner says it was the GST net amounts paid by the Commonwealth to the applicant that funded the arrangement and that made it attractive to the Division 165 Supplying Entities.

95 There was no dispute before the Tribunal that the Division 165 Supplying Entities (or, at least, the IPJ Group) were guilty of tax evasion by failing to remit to the Commissioner the GST on their taxable supplies of scrap gold to ACN 154: see the Tribunal’s reasons, [158]. ACN 154 also accepted, based on the evidence produced in the Tribunal proceeding, that certain rogue suppliers altered gold to make taxable supplies to ACN 154, collected GST-inclusive prices from ACN 154, and then fraudulently retained that GST: see the Tribunal’s reasons, [266].

96 However, ACN 154’s position was that it was not aware of the Division 165 Supplying Entities’ tax evasion (that is, the non-remittance of GST by those entities): see, eg, the Tribunal’s reasons at [162]. Further, Mr Cochineas deposed that during the relevant period neither he nor (so far as he was aware) ACN 154 or any of its management, was aware of the IPJ Group’s source of the refining material: see the Tribunal’s reasons, [162].

97 The Commissioner’s position before the Tribunal was that he was *not* alleging that ACN 154 was a party to the fraud being perpetrated by the Division 165 Supplying Entities, but he *was* alleging that ACN 154 was a willing and informed beneficiary of the scheme, because it received the benefit of input tax credits in connection with its acquisitions of this suspiciously rich and surging taxable supply of scrap gold: see the Tribunal’s reasons, [225].

98 Mr Cochineas was ACN 154’s principal witness and provided two affidavits as well as oral evidence at the hearing. He was cross-examined at length during the Tribunal hearing.

## The Tribunal’s reasons

99 The Tribunal first considered the issue of whether ACN 154 made “creditable acquisitions”; it then considered whether Div 165 of the GST Act operated.

### Whether ACN 154 made creditable acquisitions

100 It should be noted that, in the section of its reasons dealing with whether ACN 154 made creditable acquisitions, the Tribunal proceeded on the basis that the input tax credits in issue in the proceeding (that is, the input tax credits of $122,112,065 claimed by ACN 154 and disallowed by the Commissioner) concerned ACN 154’s acquisitions of scrap gold *of at least 99.99% fineness* and not its acquisitions of low-grade scrap gold: see Tribunal’s reasons, [61], [78], [80], [95] and [131].

101 As explained earlier, the issue whether ACN 154 made “creditable acquisitions” turned on whether ACN 154’s *supplies* of precious metal to dealers were (as ACN 154 contended) *GST-free* within the meaning of s 38-385 of the GST Act.

102 The Tribunal noted at [99] that the requirements in paragraphs (b) and (c) of s 38-385 were satisfied, because it was uncontroversial that ACN 154 was a “refiner of precious metal” and that the dealers were “dealers in precious metal”. Thus, the only part of s 38-385 that was in dispute was paragraph (a), which required the supply to be the “first supply of that precious metal after its refining by, or on behalf of, the supplier”.

103 The Tribunal noted, at [100], the Commissioner’s argument that ACN 154 was not engaged in “refining”, on the basis that “refining” is properly regarded as a process that is solely concerned with increasing the metallic fineness or purity of the gold; the Tribunal also noted ACN 154’s argument that “refining” might also include processes that are about (or also about) eliminating non-metallic impurities and contaminants.

104 At [101], the Tribunal stated that the word “refining” must be read in the context of the GST Act as a whole, beginning with the text of s 38-385(a). The Tribunal stated that the plain meaning of the word must be considered, but also stated that “any established trade or industry usage of the word was likely to be important in a case like this where the legislative provisions are addressed to a particular sector of business or commerce”. The Tribunal stated at [102]:

As we will explain, the precise scope of the word ‘refining’ becomes tolerably clear after one has regard to the expert evidence concerning trade usage. Ultimately, though, the true meaning of the word ‘refining’ is shaped by the language of s 38-385(a) read in its context – a context which includes ss 38-385 and 40-100 and the definition of ‘precious metal’ in s 195-1. To put it differently, the meaning of ‘refining’ becomes clear when one has regard to the context and the way in which all the words in the relevant provisions inform and interact with each other. But, as we shall also explain, the answer to the question posed in s 38-385(a) – and thus the outcome of this case – does not solely depend on whether we adopt the interpretation preferred by [ACN 154] or the Commissioner.

105 The Tribunal stated at [103] that the best guide to Parliament’s purpose was the language of the statute, citing the judgment of the High Court in *R v A2; R v Magennis; R v Vaziri* (2019) 373 ALR 214 (***Magennis***).

106 The Tribunal stated at [105] that “refining” is a plain English word. The Tribunal noted that it had been referred to dictionary definitions, including the *Macquarie Dictionary*, which defined “to refine” as including “to bring by purifying, to a finer state or form”. However, that definition did not, in the Tribunal’s view, offer a useful guide in the circumstances of this case.

107 The Tribunal then discussed a number of cases referred to by the Commissioner, concerning the meaning of “refining” in other legislative contexts. The Tribunal stated at [113] that those cases, which related to different legislative contexts, did not necessarily assist in determining the meaning of the word when it is used in s 38-385(a) of the GST Act. Nevertheless, the cases tended to confirm that the ordinary meaning of the word was attended by some ambiguity.

108 The Tribunal stated at [114] that it was particularly important to consider whether the language in s 38-385 has a trade or technical meaning, referring to a number of cases on statutory interpretation of words with such a meaning. The Tribunal noted at [117] that ACN 154 relied on the expert evidence of Dr Murray, a metallurgist with extensive experience in the gold industry, as to the trade or technical usage of the term “refining”. The Tribunal summarised his written and oral evidence at [118]-[119] of its reasons.

109 The Tribunal concluded at [120] that it was not satisfied that Dr Murray’s evidence established a common industry-wide or established trade usage of the word “refine” that was consistent with the broad interpretation preferred by ACN 154. The Tribunal stated that a glossary referred to in Dr Murray’s evidence suggested that “ifthere is a trade or industry usage that applies to the manufacturing process under consideration in this case, it is consistent with the meaning preferred by the Commissioner”. The Tribunal did not, however, make a finding that there was an accepted trade or technical meaning of “refining”.

110 The Tribunal indicated at [121] that it preferred the Commissioner’s contention regarding the meaning of “refining”:

We think the Commissioner has the better of the argument for an additional reason which is apparent from the text of the legislation. The definition of ‘precious metal’ in s 195-1 focuses on the metallic fineness of the product. While there are also requirements as to form (that is, that it must be in ‘investment form’ …), the very definition of precious metal suggests that processes which are not directed towards increasing the metallic purity of the gold above the requisite standard of fineness (99.5% in the case of gold) should not be regarded as ‘refining’. We also take comfort from the fact the definition of ‘refiner of precious metal’ in s 195-1 references an entity that “converts or refines” which suggests the GST Act distinguishes refining from other manufacturing processes. We will have more to say about the implications of this definition below.

111 The Tribunal did not consider it necessary to exhaustively or conclusively define “refining” because it was only necessary to decide whether ACN 154’s activities constituted “refining” for the purposes of s 38-385(a): Tribunal’s reasons, [122]. Further, the Tribunal noted at [123] that focussing exclusively on the word “refining” may not entirely capture the task of determining whether s 38-385(a) was satisfied.

112 The Tribunal’s core reasoning on the proper construction of s 38-385 and its application to this case was at [124]-[130]:

124. As *Magennis* reminds us, our interpretation of particular words in a statute must be informed by context and purpose. The immediate context of the word ‘refining’ is s 38-385, but we should also be conscious of s 40-100 and the definition of ‘precious metal’ in s-195-1. We will address the text of those provisions below but we should first remind ourselves of parliament’s purpose. That purpose is evident from the language and scheme of the legislation.

125. We have already discussed the operation of the GST legislation earlier in these reasons. We explained there that both ss 38-385 and 40-100 create exemptions to the ordinary rules that impose liability to GST on taxable supplies. These special arrangements in respect of dealings in gold came about because gold refined in Australia is sold into what is effectively a world-wide market. Australian businesses dealing in gold would be at a commercial disadvantage if they had to pay GST on supplies of precious metal in circumstances where their international rivals are able to sell without the GST being embedded in the price: see *Very Important Business Pty Ltd and Commissioner of Taxation* [2019] AATA 1120 at [29]. Sections 38-385 and 40-100 are the means by which Parliament achieved the effect of a level playing field in the market for precious metals. The two provisions have separate but [complementary] roles to play in that endeavour.

126. Section 40-100 is, in effect, the default position in relation to supplies of ‘precious metal’, an expression defined in s 195-1. Section 40-100 says supplies of precious metal will be input taxed. That means those supplies do not attract GST. It follows that precious metals can be supplied from one dealer to another without the burden of the GST falling on either party to the transaction, or on future parties. The parties to those transactions do not need the ability to claim input tax credits because there is no GST being passed along the supply chain. But refiners who make the first supply after manufacturing the precious metals have a problem. They will typically have paid a GST-inclusive price for the scrap gold and other products (like chemicals) acquired for use in the manufacturing process. If the subsequent supplies of precious metals are input taxed, the refiners will be unable to claim input tax credits in respect of the GST paid on the prices for the scrap gold. The refiners would be forced to bear the burden of the tax since it is not transmitted to the end user. That is where s 38-385 comes in. It creates an exception for refiners from the default rule contained in s 40-100. It allows refiners to make GST-free supplies in certain circumstances but does not affect their entitlement to claim input tax credits. That exception to the more general rule in s 40-100 ensures Australian refiners will not be disadvantaged in the market for precious metal. But the exception is only available in the limited circumstances identified in s 38-385. If *all* the requirements of that section are not satisfied, the exception to s 40-100 is not engaged. In that event, the supplies will be input taxed and there will be no entitlement to claim input tax credits.

127. The focus of our enquiry is on s 38-385(a) which refers to “the first supply of *that* precious metal *after its refining*”. The clear objective in using the word ‘that’ in reference to ‘precious metal’ and ‘after its refining’ is to confine the application of the exception to the output of processes which culminate in the production of a physical item – a particular ingot or bar – that meets the definition of ‘precious metal’ in s 195-1. Once the scrap gold has been refined to become precious metal, the first supply of *that* precious metal thereafter will be (subject to the satisfaction of other requirements in s 38-385) GST-free. However, subsequent supplies of that precious metal will be input taxed. We reject the applicant’s argument that the phrase ‘*that* precious metal’ refers to a precious metal bar not previously in existence. Nothing in the relevant paragraph suggests that is the meaning of that phrase.

128. **Properly applied, ss 40-100 and 38-385 work so that recycled gold that was already at least 99.5% fineness when acquired by the refiner (whether it is supplied to the refiner in the form of defaced bars, or melted slugs which may be comprised of defaced bars, or in any other form which is comprised of gold *that has previously been refined into precious metal*) will be input taxed pursuant to s 40-100 when it is melted down and then returned to precious metal form and supplied to dealers. This is because it is not the first supply of that precious metal after its refining to a fineness of 99.5%.** A refiner cannot transform a supply of bullion that has already been treated as GST-free into further GST-free supplies through the simple expedient of melting down the bullion, subjecting it to routine smelting and fluxing processes and re-casting it. The refiner’s position does not improve because it must treat the material to eliminate extraneous matter introduced into the gold in the course of the recycling process. That would be fiscal alchemy. Parliament plainly responded to the risk of that occurring by including the limitation in s 38-385(a) which ensured a refiner could not repeatedly ‘pass go’ with the same product and collect the metaphorical $200 in input tax credits. To find otherwise would frustrate the logic of the GST Act.

129. **We stress that our analysis of the statutory question we identified stands regardless of whether the word ‘refining’ is given the meaning contended for by the Commissioner, or the more accommodating meaning preferred by the applicant**. Even if other processes were regarded as refining as the applicant contends, s 38-385(a) effectively requires that a line be drawn under the refining once the scrap gold has been refined to the requisite 99.5% fineness standard. Thereafter, processing of those precious metals back through the refinery should be regarded as recycling, not refining. Interestingly, that is exactly how the applicant itself described what it was doing in the Policy Document that described its original business plan.

130. We are reinforced in our views by the definition of ‘refiner of precious metal’ in s 195-1 which, relevantly, refers to an entity that regularly “*converts or refines \*precious metal*”. We understand from the evidence the conversion of precious metal entails the changing of precious metal into another kind of precious metal, for example, larger investment-grade bullion bars are transformed into smaller bars or vice versa. On the evidence before us, all gold would be subjected to smelting and fluxing processes, including that which was being converted. Significantly, however, s 38-385 of the GST Act does not confer GST-free supply status to the first (or any) supply made by a refinery when it converts ‘precious metal’, as s 38-385(a) is limited to the first supply after “*its refining*”. The production of new investment-grade bars after their conversion are, therefore, not GST-free supplies, notwithstanding they are new ‘precious metal’. They are instead input taxed under s 40-100.

(Footnote omitted; bold emphasis added.)

113 As is apparent from the passages emphasised in bold, the Tribunal rested its conclusion that s 38-385(a) was not satisfied in the present case, not on the meaning of “refining”, but on the basis that the supplies did not constitute the “first supply” of the precious metal. This was in circumstances where the gold supplied by ACN 154 to dealers was already of at least 99.5% fineness (the percentage referred to in the definition of “precious metal”) when acquired by ACN 154.

114 The Tribunal concluded at [131] that ACN 154’s supplies of gold to dealers did not satisfy the requirements of s 38-385. They were, therefore, input taxed supplies. It followed that the relevant acquisitions by ACN 154 (that is, its acquisitions of scrap gold of at least 99.99% fineness) were not “creditable acquisitions”, and ACN 154 was not entitled to claim input tax credits totalling $122,112,065 pursuant to s 11-5. ACN 154 had failed to discharge its burden of showing that the assessments were excessive.

### The application of Div 165

115 In light of its conclusion that the relevant acquisitions were not creditable acquisitions, it was strictly unnecessary for the Tribunal to consider the application of Div 165. Nevertheless, it did so for completeness: see the Tribunal’s reasons, [132].

116 The Tribunal made detailed factual findings at [132]-[226] of its reasons. First, the Tribunal referred to the expert evidence of Dawna Wright, a forensic accountant who prepared three expert reports on the instructions of the Commissioner. These reports included a review of the sources of gold of certain entities, which included the Division 165 Supplying Entities. The Tribunal largely accepted Ms Wright’s evidence: see the Tribunal’s reasons at [138], [140]. Next, the Tribunal examined in details the facts relating to each of the following Division 165 Supplying Entities: the entities comprising the IPJ Group (at [142]-[179]); the Majid Group (at [180]-[201]); Gold Buyers (at [202]-[208]); and MAK (at [209]-[223]). The Tribunal also made some further findings at [224]-[226].

117 The Tribunal’s factual findings may be summarised as follows:

(a) The Tribunal found that a very large proportion of the scrap gold supplied by the Division 165 Supplying Entities to ACN 154 during the relevant period was already of at least 99.99% fineness: see Tribunal’s reasons, [139]-[140], [148], [220].

(b) The Tribunal found that a substantial proportion of the scrap gold supplied by the Division 165 Supplying Entities to ACN 154 was acquired by those entities (directly or indirectly) from the Dealers (that is, ABC NSW and Ainslie) and was acquired in precious metal form: see the Tribunal’s reasons, [151], [154], [156], [158], [159], [161], [189], [196], [197], [204]-[206], [218]-[220], [223], [224]. The Tribunal referred to this as a ‘round robin’ arrangement, at least as to some of the gold, as between the Dealers, IPJ Group and ACN 154: see the Tribunal’s reasons, [158]; see also [197].

(c) The Tribunal found that the Division 165 Supplying Entities defaced, damaged or altered that precious metal so that it was no longer in precious metal form (that is, it became scrap gold): see the Tribunal’s reasons, [151], [182], [197], [199], [215], [223], [224]. This meant that the gold no longer satisfied the “investment form” requirement of the definition of “precious metal”; it could therefore be the subject of a taxable supply to ACN 154, attracting GST: see the Tribunal’s reasons, [224].

(d) The Tribunal found that the Division 165 Supplying Entities engaged in tax evasion by way of non-remittance to the Commissioner of the GST on the supplies of scrap gold to ACN 154: see the Tribunal’s reasons, [158], [200], [207], [221], [224].

118 The Tribunal also examined, throughout this part of its reasons, whether ACN 154 had knowledge of (or was on notice of) all or any of the above matters. The Tribunal made findings or observations about ACN 154’s knowledge at various places through this part of its reasons (see, eg, [163], [172], [173], [198], [199], [204], [215], [223]). Ultimately, the Tribunal concluded as follows (at [224]):

The further findings we make in relation to the Division 165 Supplying Entities are, as follows. We find the applicant was aware these suppliers were acquiring investment-grade bullion from the Dealers (especially in the case of its related entity, ABC NSW). We also find the applicant more than likely knew the Division 165 Supplying Entities were altering the bullion so it no longer satisfied the investment form requirement of precious metal to make taxable supplies to the applicant. We also find the applicant was on notice these suppliers were not remitting the GST because it would have been uneconomic for them to do so. We reach that conclusion, in particular, based on the prices at which they bought the precious metal from the Dealers or other intermediaries, namely, ‘spot price plus a premium’, and the prices at which the Division 165 Supplying Entities later sold the scrap gold (whether or not it was the same gold) to the applicant for refining. The price paid by the applicant was a GST-inclusive price, namely, ‘spot price less a discount plus GST’ with the GST liability owed to the Commissioner. However, it was only economically feasible for the suppliers to undertake the transactions if they recovered the GST in the price of the scrap gold from the applicant but did not remit the GST to the Commissioner.

119 Having made those factual findings, the Tribunal next considered whether there was a “scheme” within the meaning of the provisions. The Tribunal concluded that there was a scheme, being the wider scheme alleged by the Commissioner: see the Tribunal’s reasons at [244]. The Tribunal also concluded, in the alternative, that the narrower scheme was established: see at [244].

120 The Tribunal next considered the issue of “GST benefit”, concluding that ACN 154 obtained a GST benefit, namely input tax credits in the amount of $72,953,611.

121 The Tribunal then considered the issues of dominant purpose and principal effect. The Tribunal discussed relevant authorities regarding the objective nature of the tests at [263]. At [264], the Tribunal noted the Commissioner’s submission that one or more of the following listed entities entered into or carried out the scheme or a part of the scheme:

(a) ACN 154;

(b) the IPJ Group entities;

(c) the Majid Group entities, Gold Buyers and/or Mr Faraj;

(d) MAK and/or Mr Michael Kukulka;

(e) Your Privacy Policy Pty Ltd and/or Mr Robert Bourke; and

(f) USH and/or Mr Rocco Calabrese.

122 As the Tribunal noted, the Commissioner submitted that these entities entered or carried out the scheme with the sole or dominant purpose of ACN 154 getting a GST benefit from the scheme (namely, the input tax credits for its acquisitions, for which it paid GST-inclusive prices to the Division 165 Supplying Entities).

123 The Tribunal’s reasoning is usefully captured in the following passage, in which it first set out a summary of ACN 154’s arguments, and then set out the Tribunal’s response:

266. The applicant’s position was that it is not reasonable to conclude any participant in the alleged scheme (in either of its formulations) entered into or carried out the scheme, or part of the scheme, for the dominant purpose of the applicant getting a GST benefit. The applicant accepted, based on the evidence produced, that certain rogue suppliers altered gold to make taxable supplies to the applicant, collected GST-inclusive prices from the applicant and then fraudulently retained that GST. However, the applicant distanced itself from that fraudulent conduct and argued its dominant purpose, having regard to the listed matters, was not to secure input tax credits but to acquire scrap gold it needed to produce precious metal. It said it is irrational to suggest the dominant purpose of a taxpayer acquiring a taxable supply of goods that are critical to its business is not to obtain the goods themselves but simply to obtain the input tax credits. In any event, the applicant argued the availability of input tax credits to the applicant was an expected and natural incident of the payment of GST-inclusive prices.

267. Further, the applicant submitted it was not the principal effect of the scheme that the applicant received the GST benefit: it submitted the principal effect was to enable the rogue suppliers to sell scrap gold to third-party purchasers including the applicant as a taxable supply, thereby enabling those suppliers to recover GST-inclusive prices and fail to remit that GST to the Commissioner. The applicant says that is the step which cannot be explained other than by reference to tax evasion on the part of the Division 165 Supplying Entities, and the availability of input tax credits to the applicant was irrelevant to the purpose and effect of any scheme participant.

268. The applicant’s arguments have a superficial appeal, but the reality is that the applicant’s entitlement to the input tax credits was more important to the operation of the scheme than the GST liabilities evaded by the Division 165 Supplying Entities. The input tax credits paid by the Commonwealth to the applicant funded the round-robin arrangements because, in simple terms, it was only economically feasible for the applicant to pay those GST-inclusive prices to the Division 165 Supplying Entities in the knowledge that the applicant would receive the input tax credits. Without the entitlement to the input tax credits, the applicant would not have paid those prices to the Division 165 Supplying Entities and, consequently, there would have been no acquisition of precious metal by the third-party suppliers (including the Division 165 Supplying Entities) from the Dealers. There would have been no defacing of that precious metal, no taxable supplies in altered form to the applicant, no processing of the metal by the applicant, and no sale of an equivalent amount of precious metal back into the market by the applicant to the Dealers, and so on. In other words, the round robin arrangements would have fallen over if the applicant had not been able to claim the input tax credits. It was the GST benefit in the form of the larger input tax credits payable by the Commonwealth to the applicant, because of the Division 165 Supplying Entities making taxable supplies to the applicant, that underpinned the scheme.

124 The Tribunal stated, at [269], that it was satisfied that either ACN 154 or the other entities listed in [264] of the Tribunal’s reasons (set out at [121] above) entered into the scheme (in either of its formulations) with the dominant purpose of ACN 154 getting a GST benefit from the scheme. The Tribunal then considered the various matters listed in s 165-15 at [270]-[279]. In the context of the manner in which the scheme was entered into or carried out (s 165-15(1)(a)), the Tribunal stated at [271]:

**As we have explained above, Mr Cochineas and Ms Simpson – but especially Mr Cochineas – were on notice (and in some cases had actual knowledge) of the fraudulent activities of the Division 165 Supplying Entities. That state of knowledge must be attributed to the applicant**. Further, the Division 165 Supplying Entities created a liability to GST when making taxable supplies of scrap gold and the Division 165 Supplying Entities passed on the GST to the applicant as part of the price for the scrap gold. There was no commercial reason for the round robin arrangement except for the GST consequences arising from the different treatments of gold. Accordingly, the manner in which the scheme was carried out strongly suggests the dominant purpose of the entities listed at [264] above (including the applicant), was to secure the GST benefit.

(Emphasis added.)

125 At [280], the Tribunal stated that it was satisfied that the dominant purpose of the entities listed at [264] of its reasons was to create an entitlement to claim input tax credits in ACN 154.

126 The Tribunal also found, at [281], taking account of the matters listed in s 165-15, that the principal effect of the scheme or part of the scheme (in either of its formulations) was that ACN 154 obtained the GST benefit from the scheme, directly or indirectly.

127 The Tribunal concluded, at [284], that Div 165 did apply to ACN 154 and that the Commissioner was correct to negate the GST benefits in the sum of $72,953,611 (in the alternative to the assessments that denied the input tax credits totalling $122,112,065).

128 In relation to penalties, the Tribunal concluded at [290]-[292] that the administrative penalties were correctly imposed and, further, that the Commissioner was correct in not remitting all or any part of the administrative penalties.

## The appeal

129 ACN 154 appeals on a question of law from the whole of the Tribunal’s decision. The notice of appeal states the following questions of law:

1. Whether the meaning of the term “refining” in s.38-385(a) of the GST Act refers to a process designed to increase the fineness of gold by removing metallic and non-metallic impurities.

2. Whether a “refiner of precious metal” (as defined), when subjecting gold that is not “precious metal” (as defined) to a recognized refining process, must have the purpose of increasing metallic purity to be found to have ‘refined’ the gold for the purposes of s.38-385 of the GST Act.

3. Whether ss.40-100 and 38-385 of the GST Act are to be construed such that a supply of gold in precious metal form after its refining by a refiner of precious metal is not “the first supply of that precious metal” for the purpose of s.38-385(a) where gold that was subject to the refining was comprised of gold that had previously been refined into precious metal but was not in precious metal form when acquired by the refiner.

4. Whether the Applicant’s failure to call witnesses to corroborate the evidence of Mr Cochineas prevented the Tribunal from accepting the evidence adduced by the Applicant.

5. Whether findings of fact (described below) were open to the Tribunal.

5A. Whether there was a denial of procedural fairness by the Tribunal in making its findings at [172]-[173], [224] and [271].

6. Whether a series of independent and uncoordinated events constitute a “scheme” within the meaning of s.165-10(2).

7. Whether any entity entered into the scheme, or part of the scheme, for the dominant purpose of the Applicant getting a GST Benefit (namely input tax credits on its acquisitions of refining material for which the Applicant paid the whole of the GST inclusive price).

8. Whether the principal effect of the scheme, or part of the scheme, was for the Applicant to get the GST Benefit from the scheme.

130 ACN 154 relies on 34 grounds in the notice of appeal. These include grounds 2A, 2B, 10A, 22A and 30A, which have been added since the original version of the notice of appeal. Original grounds 8 and 17 are no longer pressed.

## Issues relating to the operation of the GST Act apart from Div 165

### The construction issue

131 The construction issue may be stated as follows: whether the Tribunal erred in its construction of s 38-385 and in making certain related findings. This issue is raised by the first three questions of law and by grounds 2-7 in the notice of appeal.

132 The principles of statutory construction are well established and need not be set out in detail. It is sufficient to refer to: s 15AA of the *Acts Interpretation Act 1901* (Cth); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26]; and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 a [14].

133 The construction issue has a number of elements or sub-issues: whether the Tribunal erred in not finding that “refining” has a trade or technical meaning; the meaning of the word “refining” in s 38-385 (assuming the word does not have a trade or technical meaning); and the meaning of the “first supply” requirement in s 38-385. We will address each of these in turn.

134 Insofar as ACN 154 contends that the Tribunal erred in not finding that “refining” has a trade or technical meaning (at [120] of the Tribunal’s reasons), ACN 154 submits that the Tribunal’s conclusion was founded on a misapprehension of both the legal test for establishing the existence of a trade meaning and the unchallenged evidence of Dr Murray. ACN 154 submits that the Tribunal correctly referred to *Zeroz Pty Ltd v Deputy Commissioner of Taxation* (1997) 35 ATR 349 (***Zeroz***), but failed to apply it. ACN 154 submits that in *Zeroz*, the Full Court held at 357 that in determining whether there is trade usage for a word, the first task is to identify the trade in which the expression is used, and this may be an industry generally or a particular trade in that industry. ACN 154 submits that: by its terms, s 38-385 applies to “refiners of precious metal”; accordingly, the trade or industry to which regard is to be had is the *refining industry* and not the *mining industry*. ACN 154 refers in its outline of submissions to the written and oral evidence of Dr Murray. In substance, his evidence is said to be to the effect that in the precious metals industry, gold will be regarded as having been “refined” if it has been subject to any one of the refining processes he describes, including smelting with fluxes, and whether or not a change in metallic fineness occurs.

135 We are not satisfied that the Tribunal made any of the errors outlined in ACN 154’s submissions. The Tribunal appears to have directed its attention to the *refining industry*. For example, in [118] of its reasons, the Tribunal referred to *A Guide to the London Precious Metals Markets*, published by the LBMA and the London Platinum & Palladium Market in 2008, and relied on the definition of “refining” in the glossary to that publication. The Tribunal described that publication as a “refining industry guide” at [120] of its reasons. Thus, we are not satisfied that the Tribunal failed to identify the relevant industry or trade, or that it identified the wrong industry or trade. Further, in light of the evidence discussed by the Tribunal at [118]-[120] of its reasons, we are not satisfied that the Tribunal misapprehended the evidence of Dr Murray. The Tribunal set out extracts of the evidence he gave during the hearing at [119] and explained the basis for its conclusion at [120]. No error of law is shown in the Tribunal’s conclusion that it was not satisfied that “refining” had a trade or technical meaning.

136 Proceeding, then, on the basis that the word “refining” in s 38-385 does not have a trade or technical meaning, the next question is whether the Tribunal erred insofar as it adopted (or indicated a preference for) a particular construction of the word “refining”, namely that “processes which are not directed towards increasing the metallic purity of the gold above the requisite standard of fineness (99.5% in the case of gold) should not be regarded as ‘refining’” (at [121], quoted above). The parties’ submissions may be summarised as follows. ACN 154 submits that: the ordinary meaning of the transitive verb “to refine” includes “to bring by purifying, as to a finer state or form” (*Macquarie Dictionary*, 7th ed); and the processes undertaken by ACN 154 by which refining material was transformed into precious metal constituted “refining” as they purified it of impurities (metallic and non-metallic) and brought the material into a finer state or form. The Commissioner, on the other hand, submits that, having regard to the ordinary and common meaning of the word “refining” and the statutory context in which it is used (including, in particular, the definition of “precious metal” in s 195-1), “refining” in s 38-385 connotes the activity of increasing the metallic fineness of metal, by the removal of metallic impurities: cf *Attorney-General v Colonial Sugar Refining Company Ltd* (1900) 26 VLR 83 (***Colonial Sugar Refining***) at 84-86; *Caltex Australia Petroleum Pty Ltd v Federal Commissioner of Taxation* (2008) 173 FCR 359 (***Caltex Australia Petroleum***) at [96]; *Mayes, Internal Revenue Collector v Paul Jones & Co* (1921) 270 F 121 (***Paul Jones***) at 132. Thus, the Commissioner does not embrace the view that, for a process to constitute “refining” within the meaning of the provision, it must be directed to increasing the metallic fineness of gold from below to above 99.5%.

137 In our view, neither the text nor the context of s 38-385 supports the construction adopted (or preferred) by the Tribunal, namely that “processes which are not directed towards increasing the metallic purity of the gold above the requisite standard of fineness (99.5% in the case of gold) should not be regarded as ‘refining’”. The ordinary meaning of the word “refining” (as indicated by the *Macquarie Dictionary* definition quoted above) and the statutory context suggest that the word “refining” in s 38-385 is referring to a process by which metal is brought to a finer state or form. It may be accepted that, as the Commissioner submits, this is concerned with increasing the metallic fineness of the metal. But this does not require that the process be directed towards increasing the metallic fineness of the metal above the requisite standard of fineness (99.5% in the case of gold). First, it is the nature of the process rather than its objective that is relevant. Secondly, a process may constitute refining if it increases the metallic fineness of gold, whether or not it increases the metallic fineness above 99.5%. While the definition of “precious metal” does refer to “gold (in an investment form) of at least 99.5% fineness”, and that definition is to be ‘read into’ s 38-385 in accordance with the approach described by McHugh J in *Kelly v The Queen* (2004) 218 CLR 216 at [103], it would be strained to construe “refining” as referring only to a process by which the fineness of gold is increased from below 99.5% to at least 99.5%. Thus, a process that increases the metallic fineness, for example, from 99.5% to 99.99% would constitute “refining”, even though the gold was already at the level of fineness required for precious metal.

138 We note that, in addition to its reliance on the definition of “precious metal”, the Tribunal referred at [121] to the fact that the definition of “refiner of precious metal” in s 195-1 references an entity that “converts or refines” and saw that distinction as supporting the Commissioner’s construction. There was evidence before the Tribunal that “conversion”, in its purest sense, refers to the supply of larger bars and converting them to smaller bars. We do not consider the reference to “converts or refines” in the definition of “refiner of precious metal” to assist. In particular, it does not suggest that “refining” means something narrower than a process by which metal is brought to a finer state or form. Such processes are not aptly described as converting.

139 The cases cited by the Commissioner do not suggest any different meaning of “refining”. In *Colonial Sugar Refining*, in the context of construing the term “molasses refined”, Madden CJ said at 85 that the word “refining” may mean, in ordinary language, any degree of purification, complete or otherwise. After referring to some dictionary definitions, his Honour said at 85-86 that “[n]obody speaks of the refinement of the gold when only separating the quartz and other like substances in which it is found, but which form no inherent part of it, from the metal. One only refines when one comes to retort the gold and the inherent alloys, silver, copper, etc., are extracted from it”. The judgment of Madden CJ was overturned on appeal. Justice Holroyd, delivering the judgment of the Full Court, said at 87 that “refining” in relation to gold was a process of “an entirely different nature” from the refining with which the Court was concerned in that case.

140 In *Caltex Australia Petroleum*, Sundberg J discussed Madden CJ’s judgment in *Colonial Sugar Refining* and then said at [96]:

As is evident from his Honour’s decision, some form of purification — in the sense of removing intrinsic impurities — was central to the concept of refinement or “refined” as it was held to have been used in the relevant Victorian legislation.

141 In *Paul Jones*, the Circuit Court of Appeals, Sixth Circuit, in the context of considering whether a process for the removal of charcoal contaminants from distilled spirits amounted to “purifying” or “refining” for the purposes of revenue legislation, stated at 132:

We are of the opinion, however, that the terms “purifying” and “refining,” as used in the Revenue Act of October 3, 1917, and in paragraph 3, section 3244, R. S., mean something more than the removal of nonsoluble particles of charcoal that perchance may become loosened and detached from the charred staves of the barrels in which the spirits are aged. …

“Purifying” or “refining,” as used in these statutes, undoubtedly means the removal, chemical change, or modification of objectionable soluble matter, held in solution in the distilled spirits, united therewith and forming a constituent and integral part thereof, so that its removal, chemical change, or modification will change or alter, in some degree, at least, the character or quality of the entire volume of the distilled spirits.

142 Once the Tribunal’s preferred construction of “refining” is rejected, it is clear on the findings of the Tribunal, and the unchallenged evidence before the Tribunal, that the processes of smelting and fluxing undertaken by ACN 154 (a refiner of precious metal) in relation to the scrap gold it received constituted refining. As noted above, the Tribunal found at [96] that ACN 154 invariably subjected the material to smelting and fluxing processes. By those processes, the gold was brought to a finer state or form, by the removal of metallic impurities. As the Tribunal noted in [84], Mr Williams pointed out in his oral evidence that the very act of melting the gold in controlled circumstances in and of itself caused the gold to become purer; every time gold was melted, it increased its metallic fineness as silver and other metals were volatilised. The Tribunal did not refer to any contrary evidence, or indicate that that evidence was challenged. Further, at [96], the Tribunal accepted that the very act of melting the scrap gold in controlled circumstances by ACN 154 might incidentally increase the metallic purity of the material.

143 We note that the Commissioner submits that: in relation to the gold of 99.99% fineness acquired by ACN 154, it did not undertake an activity of increasing the fineness of the gold; it acquired gold of 99.99% fineness, not in investment form, which it processed and then supplied in investment form with the same fineness. The Commissioner also submits that the fact that there may have been a minute increase in the fineness of the gold through the smelting and fluxing process does not assist ACN 154; any increase in fineness that occurred was incidental and inconsequential. We do not agree. The fact that there was some increase in the metallic fineness, albeit small, is relevant in considering whether the processes constituted refining. While the increase may not have been apparent if the fineness of the gold was measured at two decimal points (eg, 99.99%), it would presumably have been apparent if the fineness was measured at three or more decimal points (eg, 99.991%). The fact that the increase in metallic purity was small does not preclude the processes being characterised as “refining”.

144 It may be that smelting and fluxing processes undertaken by ACN 154 also involved the removal of *non-metallic* impurities. At [84] of its reasons, the Tribunal stated that having melted the material, there was an opportunity to eliminate any non-metallic impurities that might be present, like silicates, borates, carbides, sulphides and other compounds of these materials. However, it seems that the removal of non-metallic impurities may not result in an increase in metallic fineness. We therefore put this to one side.

145 It is the nature of the processes, rather than their purpose, that is critical in determining whether they constitute “refining”. Thus, even if (as the Tribunal found at [84] and [96]) the primary objective of these processes was to provide *quality assurance* (rather than to increase the metallic purity), the processes nevertheless constituted “refining” in the sense outlined above. On the facts as found by the Tribunal, and the evidence of Mr Williams referred to above, the processes of smelting and fluxing undertaken by ACN 154 brought the scrap gold to a finer state or form, by the removal of metallic impurities.

146 The next sub-issue concerns the “first supply” requirement of s 38-385(a), that is, that the supply of precious metal be “the first supply of that precious metal after its refining by, or on behalf of, the supplier”. We start by setting out the submissions of the parties. ACN 154 submits that s 38-385(a) has two relevant criteria: (1) the precious metal the subject of the supply must not have previously been supplied (it must be the “*first* supply of that precious metal”); and (2) the precious metal must have been “refined” by or on behalf of the refiner who made the supply (“after its refining”). ACN 154 submits that: the reference to “precious metal” can only be a reference to the physical subject of the supply (i.e. a specific gold bullion bar), not the gold content of the bar being supplied; this follows from the use of the word “that” and the definition of “precious metal”, which requires both a minimum level of metallic purity (99.5%) and a particular form (investment form). Therefore, ACN 154 submits, there will be a “first supply of *that* precious metal” when a refiner supplies a precious metal bar that was not previously in existence (i.e. it was created by the refiner) and that bar has not been the subject of a previous supply.

147 The Commissioner, on the other hand, essentially adopts the reasoning of the Tribunal on this issue. On the Tribunal’s findings, ACN 154’s acquisition of gold of 99.99% fineness included gold ACN 154 or other refiners had previously supplied as gold in investment form of at least 99.5% fineness. The Commissioner submits that the gold so acquired had been damaged or defaced (deliberately in the case of acquisitions from the Division 165 Supplying Entities), with the consequence that it was no longer precious metal. The Commissioner submits that, accordingly, ACN 154’s subsequent supply of that gold in investment form was not its first supply of that gold in investment form after its refining within the meaning of s 38-385.

148 The Commissioner submits that “precious metal” is a defined term and the proper course is to read the words of that definition into s 38-385 and then construe the provision as a whole: see *Kelly v The Queen* at [103]. The Commissioner submits that: on the proper construction of s 38-385(a), the reference to “that precious metal after its refining” is a reference to the gold (or other relevant metal) that has been refined; that construction gives effect to the statutory function of s 38-385, which in relation to acquisitions of gold, is to facilitate the determination of the extent to which the acquisitions are creditable acquisitions under s 11-15: see ss 11-5, 11-15(2)(a), 9-30, 40-1, 40-100, 38-1, 38-385, 195-1 (definition of “precious metal”); *AXA Asia Pacific Holdings Ltd v Federal Commissioner of Taxation* (2008) 173 FCR 500 at [31], [38], [124], [127]; *Rio Tinto Services Ltd v Federal Commissioner of Taxation* (2015) 235 FCR 159 at [7], [8]. The Commissioner submits that, under s 11-15(2)(a), the relationship that is relevant to determining input tax credits included in the net amount under s 17-5 is the relationship that the acquisitions have to making supplies that are input taxed; a precise tracing of individual inputs to individual outputs is not required: *HP Mercantile Pty Ltd v Federal Commissioner of Taxation* (2005) 143 FCR 553 at [40], [46]; *Federal Commissioner of Taxation v American Express Wholesale Currency Services Pty Ltd* (2010) 187 FCR 398 at [78], [108]. The Commissioner submits that: his construction is consistent with the text of the provision itself and, in particular, the words “after its refining”; the possessive pronoun “its” is a reference to the “gold (in an investment form) of at least 99.5% fineness”; it makes no sense to speak of the refining of a gold bullion bar not previously in existence as opposed to the refining of the gold content of such a bar.

149 In our view, ACN 154’s construction is to be preferred, as it best reflects the text and grammatical sense of the provision, and the statutory context. The word “that” in paragraph (a) of s 38-385 indicates that the precious metal referred to in that paragraph is the precious metal earlier referred to in the opening line of the section; this suggest that paragraph (a) is referring to a particular bar or other object, being the subject of the supply referred to in the opening line. That is the grammatical sense of the provision. This is confirmed when the definition of “precious metal” is ‘read into’ s 38-385(a) (in accordance with the approach described in *Kelly v The Queen* at [103]):

**38-385 Supplies of precious metals**

A supply of [gold (in an investment form) of at least 99.5% fineness] is ***GST-free*** if:

(a) it is the first supply of that [gold (in an investment form) of at least 99.5% fineness] after its refining by, or on behalf of, the supplier; and …

150 This approach tends to confirm that both the opening line of the section and paragraph (a) are referring to the supply of a particular bar or other object of gold, because “gold (in an investment form) of at least 99.5% fineness” is necessarily a bar or other object in an investment form. The opening line refers to a supply of “precious metal”. Paragraph (a) refers to the first supply of that “precious metal”. The natural sense of these words, reading in the definition of “precious metal”, is that they refer to a supply (or the supply) of a particular bar or other object in precious metal form.

151 It is true that, as the Commissioner points out, paragraph (a) of s 38-385 also uses the words “after its refining”. Those words, taken in isolation, could refer to the gold content rather than the bar or other object in precious metal form. However, when the provision is read as a whole, we consider it to be tolerably clear that the words “after its refining” refer to a time after the bar or other object has been refined; in other words, after it has been produced through a process of refining.

152 We note that the Commissioner also submits that the notion that a refiner should be entitled to input tax credits in respect of all of its acquisitions of gold used to make precious metal bars, even though only a small portion of the gold is actually refined, is illogical and has the potential to give rise to absurd outcomes. We do not accept that the result of this construction is illogical or that it produces absurd outcomes. The premise of the submission appears to be that only a small portion of the gold is actually refined. However, on the facts of the present case, as discussed above, all of the scrap gold that was acquired by the ACN 154 was subjected to a process of refining. Further, any reading of the provision other than the one that we prefer would mean that it would be practically impossible for the provision to operate sensibly. In each case, it would be necessary to inquire into the history of the gold matter making up the bullion, which would appear to be impossible in almost all cases. It is likely that any gold which has not been recently mined will have been around the production loop many times. This practical difficulty suggests that the Commissioner’s construction is unlikely to have been intended.

153 Further, in our view, the construction we prefer (as outlined above) is consistent with the statutory purpose of the provision. It may be accepted that, as the Tribunal stated at [125]-[126], the statutory purpose of the provision is, broadly, to create a ‘level playing field’ in circumstances where the market for the sale of gold in precious metal form is an international one. The construction that we prefer, whereby s 38-385(a) is read as referring to the first supply of a particular bar or other object, gives effect to that statutory purpose.

154 Finally, we note that, if the legislature had intended that the GST-free provision not apply where the gold content had already been refined and the subject of a GST-free supply, the provision would have been differently cast.

155 For these reasons, ACN 154’s construction of the “first supply” requirement of s 38-385(a) is to be preferred.

156 We note that, by grounds 2A and 2B in the notice of appeal, ACN 154 challenges certain related findings of fact made by the Tribunal. ACN 154 contends that the Tribunal erred in finding (at [84] and [96]) that the purpose of ACN 154 in undertaking the smelting with fluxes was “quality control”. ACN 154 contends that that finding was “not open” on the evidence, and that the Tribunal should have found that ACN 154 undertook the smelting with fluxes process to (among other things) remove metallic and non-metallic impurities. These grounds do not correspond to any question of law in the notice of appeal. Assuming that the basis of ACN 154’s contention is that there was ‘no evidence’ to support the finding (so as to give rise to a question of law), we are not satisfied that there was no evidence to support the Tribunal’s findings. The Tribunal referred to relevant evidence at [82]-[84] of its reasons. It should also be noted that the Tribunal’s finding at [84] was that the “primary objective” of the initial smelting and fluxing process was to provide quality assurance; the Tribunal did not find that this was the sole objective. Accordingly, we reject grounds 2A and 2B.

157 We note also ground 7 in the notice of appeal. By this ground, ACN 154 contends that, further and in any event, in circumstances where the Tribunal found that: (a) approximately 22% of the gold acquired by ACN 154 had a metallic purity of less than 99.99% (Tribunal’s reasons, [80], [95]); and (b) the precious metal bars were produced from combined granule stock that was undifferentiated as to its original source (Tribunal’s reasons, [91]), the Tribunal erred in concluding that precious metal supplied by ACN 154 was not the first supply of that precious metal after its refining for the purposes of s 38-385(a). One of the difficulties with this ground is that, as noted at [100] above, the Tribunal proceeded on the basis that the input tax credits in issue in the proceeding concerned ACN 154’s acquisitions of scrap gold of at least 99.99% fineness and not its acquisitions of low-grade scrap gold. In any event, in light of our conclusions above, it is unnecessary to determine this ground.

158 We conclude, in summary, that the Tribunal erred in its construction of s 38-385. In our view, on the proper construction of s 38-385, ACN 154’s supplies of gold to the dealers constituted the “first supply of that precious metal after its refining by … the supplier”. They were, therefore, GST-free supplies and not input taxed supplies.

### The calculation issue

159 By ground 1 of the notice of appeal, ACN 154 contends that the Tribunal erred in affirming (at [80], [95]) the Commissioner’s objection decision to deny ACN 154 input tax credits in respect of 95.15% of its acquisitions (on the basis that that proportion of ACN 154’s inputs were in excess of 99.5% metallic fineness), in circumstances where the Tribunal found that only 78% of those inputs were of that fineness. There is no corresponding question of law and this ground does not appear to raise a question of law: see generally *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 (***Haritos***) at [192]-[202]. Further and in any event, in light of our conclusion on the construction issue, it is unnecessary to consider this issue. Nevertheless, we make the following brief observations for the sake of completeness.

160 As set out in its outline of submissions, ACN 154 submits that: the Tribunal found that only 78% of ACN 154’s acquisitions of refining material had a metallic purity of 99.99% (at [80], [95]); however, the Commissioner’s assessments for the relevant period disallowed 95.15% of ACN 154’s input tax credits on the basis that that proportion of its acquisitions of refining material was of 99.99% purity; the Tribunal therefore erred in affirming the assessments in their entirety, when it followed from its own finding that the assessments were excessive to the extent of the difference (17.15% of the $122,112,065 in input tax credits or $20,942,219.15). ACN 154 relies on the Australian Taxation Office’s reasons for decision dated 15 April 2016.

161 In response, the Commissioner submits that this ground is without foundation and is of recent invention. The Commissioner submits that: as the Tribunal found (at [61], [70], [80] and [95]), the input tax credits in the sum of $122,112,065 claimed by ACN 154 and disallowed by the assessments related only to ACN 154’s acquisitions of gold *of 99.99% fineness*; that was not a matter that was ever in issue between the parties; in the Commissioner’s amended statement of facts, issues and contention (at [24(a)]) and in the Commissioner’s outline of opening submissions (at [2]-[5]) filed before the Tribunal hearing, the Commissioner expressly stated that the input tax credits totalling $122,112,065 claimed by ACN 154 were for acquisitions of gold *of 99.99% fineness* during the relevant period; ACN 154 did not put that fact in issue and led no evidence to disprove it. In oral submissions on the appeal, senior counsel for the Commissioner submitted that the affidavit evidence relating to the 78% figure indicated that this was based, not on total *acquisitions*, but on the total amount of gold *received*, including gold received by ACN 154 for toll refining (such gold not being *acquired* by the refiner); to the extent that the Tribunal stated (eg at [95]) that 78% of the gold *acquired* by ACN 154 was of 99.99% fineness, it should have stated that 78% of the gold *received* by ACN 154 was of that fineness.

162 In our view, the point ACN 154 seeks to agitate was not put in issue before the Tribunal. The Commissioner’s amended statement of facts, issues and contention (at [24(a)]) made clear that the Commissioner’s position was that the input tax credits totalling $122,112,065 claimed by ACN 154, and disallowed by the assessments in issue, were for acquisitions of gold *of 99.99% fineness* during the relevant period. ACN 154’s statement of facts, issues and contentions, and its outline of closing submissions, did not put that matter in issue. Nor did ACN 154’s outline of closing submissions put the matter in issue. Although [84] of those submissions referred to only 78% of ACN 154’s refining material being high purity (99.99%), that submission was advanced in the context of the “refining” issue and did not challenge the calculation of the assessments. It is unnecessary to determine whether, as the Commissioner submits, the evidence relating to the 78% figure was based on the total amount of gold *received*, as distinct from *acquired*. In any event, ACN 154 did not put in issue the calculation of the assessments. The issue is not straightforward and has a factual dimension. It is too late for ACN 154 to raise the issue now. Accordingly, if it were necessary to decide the point, we would reject this ground of appeal.

### Conclusion on issues relating to the operation of the GST Act other than Div 165

163 It follows from our conclusion in relation to the construction issue that, subject to the operation of Div 165, ACN 154 is entitled to input tax credits totalling $122,112,065 in respect of its acquisitions of scrap gold from the suppliers.

## Issues relating to Div 165

164 In light of our conclusions above, it is necessary to consider the issues relating to Div 165 of the GST Act. The issues have been identified in the Introduction to these reasons.

### The procedural fairness issue

165 This issue may be stated as: whether the Tribunal denied ACN 154 procedural fairness in making certain findings; in particular, whether the Tribunal denied ACN 154 procedural fairness in the Tribunal’s reliance on three documents, which had not been the subject of cross-examination or submissions. This issue is raised by question of law 5A and grounds 9, 10 and 30A. Question of law 5A and ground 30A were added, by leave, during the appeal hearing.

166 At the outset, it is useful to identify the way the procedural fairness issue emerged. In ACN 154’s outline of submissions for the appeal, it focussed on the Tribunal’s reliance (at [168]-[169] and [172]) on two emails passing between two employees of ABC NSW. It was submitted by ACN 154 that Mr Cochineas was not a party to the emails, he was not cross-examined about them, and the Commissioner made no submissions about them. Moreover, ACN 154 submitted, the Commissioner expressly disavowed making any submission or drawing any inference that Mr Cochineas or ACN 154 knowingly participated in a fraud. ACN 154 submitted that, not only was it a fundamental denial of procedural fairness for the Tribunal to make adverse findings about Mr Cochineas and ACN 154 (*Annetts v McCann* (1990) 170 CLR 596 at 608), the Tribunal’s gratuitous observations that Mr Cochineas was “disingenuous” about denying having suspicions about the IPJ Group and that the “applicant did not put on any evidence to explain the incident canvassed in the above emails” (at [172] and [170] respectively) were entirely unwarranted.

167 In the course of oral submissions during the appeal hearing, ACN 154 developed its submissions on these matters beyond those in its outline of submissions. In addition to the Tribunal’s reliance on two emails, ACN 154 also complained about a denial of procedural fairness in the Tribunal’s reliance (at [171]-[172]) on a transcript of a compulsory examination of Mr Cochineas in circumstances where, as with the emails, although included in the Hearing Book, the document was not the subject of any cross-examination or submissions.

168 Having outlined ACN 154’s contentions, we now set out the relevant parts of the Tribunal’s reasons.

169 The key relevant part of the Tribunal’s reasons is [168]-[173], which forms part of the Tribunal’s analysis of the facts relating to the IPJ Group. Before setting out those paragraphs, it is necessary to refer to some earlier parts of this section of the Tribunal’s reasons in order to provide context:

(a) At [157] of the Tribunal’s reasons, the Tribunal stated that: Mr Cochineas deposed (in his evidence before the Tribunal) that he and, therefore, ACN 154 were aware the IPJ Group were acquiring investment-grade bullion from ABC NSW during the relevant period; this did not give him any cause for concern and he provided various explanations; initially, he said it confirmed the business model of the IPJ Group explained to him by Mr Catanzariti at their first meeting, which was that the IPJ Group secured its supply of scrap gold by exchanging investment-grade bullion for the scrap gold of its clients. The Tribunal stated that, on another occasion, in a compulsory examination, Mr Cochineas said it was generally his understanding that persons in the industry engaged in barter transactions because they were wary of carrying cash in the sums of $50,000 or $40,000 and a bullion bar which has the equivalent value is much more transportable; Mr Cochineas also said the IPJ Group was refining the scrap gold it acquired as part of the barter to gold of 99.99% fineness and delivering it in granule form to ACN 154 for further refining.

(b) At [158], the Tribunal stated that it gleaned from numerous T-Documents and evidence, as outlined later in its reasons, that the claimed arrangements of the IPJ Group with so-called third-party jewellers and scrap dealers were entirely fabricated. The Tribunal inferred that the IPJ Group did this for several reasons including to obscure what was otherwise a ‘round robin’ arrangement (at least in relation to some of the gold) between the Dealers (including ABC NSW), the IPJ Group and ACN 154, and to also conceal the IPJ Group’s tax evasion. The Tribunal clarified that the tax evasion that the IPJ Group was engaged in was the non-remittance by the IPJ Group to the Commissioner of the GST on its taxable supplies of scrap gold (a matter that was not in dispute before the Tribunal).

(c) At [159], the Tribunal stated that it inferred and accordingly found that the IPJ Group interposed certain entities to disguise the circularity of the arrangements between the IPJ Group, ACN 154 and ABC NSW, by giving the impression there were barter transactions with jewellers and scrap dealers in order to conceal the melting of the purchased investment-grade bullion into scrap gold. At [160], the Tribunal stated that the evidence of Mr Smith and of the Khraibt brothers (which the Tribunal had discussed) supported its conclusion that the IPJ Group entities were not in fact engaging in any trading of scrap metal or barter transactions with jewellers and scrap dealers.

170 In that context, the Tribunal stated at [168]-[173]:

168. One of the more interesting email exchanges in the hearing book which piqued our interest with respect to the relationships between the IPJ Group, ABC NSW and the applicant, and their transactions, is reproduced below. The first email was sent by Ms Camilla Baker to Ms Kim Ronaldson (the Operations Manager of ABC NSW) at 2.27 pm on 27 July 2012. It is set out to provide the contextual background to the email that follows.

*Hi Kim*

*Just letting you know I am really unhappy with the conversation we just had regarding Phil [Cochineas] and Frank.*

*Being the Relationship Manager, I regard my position as one of developing and growing the business, which I have significantly proved already.*

*My understanding was that part of that role involves me gleaning from clients the products they need in order to service them better, and hence increasing turnover for ABC. I am aware that there is a large amount of privacy involved, and I certainly disagree that my line of questioning was not appropriate. However, I have noted our discussion and will refrain from such conversations in future.*

*I feel like I have had a slap on the wrist for a conversation I had with a client which was both jovial, and professional.*

*I’m not asking anything from you, I’m just letting you know I am really upset about it.*

*Camilla*

169. Ms Ronaldson replied, as follows, at 2.38 pm on the same day and, afterwards, forwarded both emails to her boss, Ms Simpson, for her information.

*Hi Camilla*

*I appreciate that you are upset about it, however this is a part of the relationship with the clients that you have to learn to manage. In this case the client has felt that you have stepped over the line and I am just passing on this information to you. As I said, whilst you may have a more relaxed and friendly relationship with them you also need to understand that at the end of the day business is business. They have felt that you overstepped the mark and I have to relay this to you.*

*As I also said Adrian [Catanzariti] was very insistent that you give them excellent service and they have no complaint with the way you look after their orders. He did not want this blown out of proportion and was very insistent that it remained quiet. … You just need to know where the boundaries are and those types of questions are completely off bounds. When you start talking about GST loopholes etc and this gets passed onto our refining partner its not great for any of the relationships.*

*Just take it on the chin and learn from the experience. I did not hear the conversation at all and was not aware of it until Phil [Cochineas] called me, as such I have to follow it up and ensure that it is dealt with.*

*All staff will be briefed on this as we need to be clear that we cannot ask what clients do with their product unless they are forthcoming with the information – its got nothing to do with us and we don’t need to know. We have done our checks and that’s all that is required.*

*Please lets not blow this out of proportion, I expect you to continue to develop your relationship with them.*

*Let me know if you want to talk further.*

*Thanks*

*Kim*

170. The applicant did not put on any evidence to explain the incident canvassed in the above emails, notwithstanding that the emails refer to Mr Cochineas having specifically discussed the issue with Ms Ronaldson, and it was also escalated for Ms Simpson’s attention. Ironically, Ms Ronaldson’s email records enough to portray a compromising picture for ABC NSW and the applicant as to the extent of their knowledge of the IPJ Group’s exploitation of the GST provisions. Furthermore, Ms Ronaldson expressly stated, that all staff at ABC NSW will be briefed on this “*to be clear that we cannot ask what clients do with their product … its got nothing to do with us and we don’t need to know…*” She said “*[w]hen you start talking about GST loopholes etc and this gets passed onto our refining partner its not great for any of the relationships*”.

171. Having regard to the abovementioned emails, we were interested to also read in the hearing book a transcript of a compulsory examination of Mr Cochineas on 25 March 2014, where Mr Cochineas insisted, under oath, he was unaware of any “GST fraud” and had never been queried about IPJ being involved in some sort of GST scheme in around June 2012. Moreover, Mr Cochineas maintained in that examination (which took place after the assessments had issued to the IPJ Group and before the applicant’s own GST audit in respect of the Relevant Period had commenced) that he was “supremely confident” each of the applicant’s clients were GST compliant.

172. **Mr Cochineas did not take any steps before us to correct answers he had previously given in compulsory examinations that appeared to be incomplete or inaccurate and that were inconsistent with his affidavit evidence. Mr Cochineas is disingenuous in denying in his affidavit the existence of any suspicions about the fraudulent activities of the IPJ Group entities. The email correspondence set out at [168]-[169] above contradicts Mr Cochineas’s claims that he and the applicant were entirely ignorant of any GST-related mischief by the IPJ Group entities.** **We infer Mr Cochineas and the applicant were aware the scrap gold (or at least some of it) being sold to the applicant by the IPJ Group for refining was being sourced from ABC NSW and, further, the barter transactions with jewellers and scrap dealers were likely a charade**. We are also of the opinion Mr Cochineas and the applicant were, at a minimum, on notice the IPJ Group entities were not paying the GST to the Commissioner on their taxable supplies to the applicant. This is because, in circumstances where the IPJ Group’s acquisitions were being made from ABC NSW at spot price plus a premium, the price at which the IPJ Group were then on-selling some of the gold to the applicant (spot price less discount plus GST) would not have been commercially feasible if GST was remitted. **We think it highly unlikely Mr Cochineas, an astute businessman, was unaware that the IPJ Group was somehow exploiting ‘GST loopholes’ in circumstances where the GST issues were a topic of special interest to Mr Cochineas and the applicant from, at the latest, early 2012**. At that time, it will be recalled, he and his associates prepared the Policy Document analysing whether the applicant was a recycler or a refiner (see [54] above). Based on the evidence before us, the preparation of the Policy Document coincided with the start of the applicant’s business arrangements with the IPJ Group in early 2012. It will also be recalled the IPJ Group was the applicant’s first ‘client’ and it proffered its templates to the applicant, including a tax invoice form. We consider Mr Cochineas and the applicant were aware of facts and circumstances which, at a minimum, put them on notice of the IPJ Group’s fraudulent activities. These include the large value and frequency of gold transactions, the high purity of the gold delivered by the IPJ Group to the applicant, the pricing of the gold, the coincidences of timing of payments and deliveries of precious metal followed by deliveries of scrap gold, the readiness of ABC NSW to buy precious metal produced by the applicant following deliveries by the IPJ Group, and the special friendship between the Cochineas brothers and the Catanzariti brothers.

173. Our conclusion with respect to the above is, so far as relevant for present purposes, that the applicant was, at a minimum, on notice the IPJ Group entities were engaging in conduct that involved the evasion of GST, as well as the exploitation of provisions in the GST Act (the latter being the subject of these proceedings), but didn’t want that fact to be known. Importantly, the applicant could and did take advantage of the situation by making creditable acquisitions. As discussed in further detail below, the exploitation of the provisions of the GST Act involved the IPJ Group making acquisitions of investment-grade bullion, then melting the gold bars such that they were no longer in precious metal form and, in turn, selling the scrap gold (or some of it) to the applicant as taxable supplies. In this way, the IPJ Group created a matching entitlement to an input tax credit for the GST payable for the applicant which was essential to perpetuate the round robin arrangement. We accept the IPJ Group was also selling some of the scrap gold to other refiners and, further, that the IPJ Group was also sourcing precious metal from other bullion dealers so that it was not necessarily always the *same gold* that was being sold by it in the arrangement. However, we are concerned with the IPJ Group’s supplies of scrap gold of at least 99.99% fineness to the applicant.

(Footnotes omitted; bold emphasis added.)

171 After considering the facts relating to the Majid Group, Gold Buyers, and MAK, the Tribunal made some additional findings regarding the Division 165 Supplying Entities at [224] (set out at [118] above).

172 The Tribunal relied on those findings in the course of considering the list of matters in s 165-15, including the manner in which the scheme was entered into or carried out at [271] (set out at [124] above).

173 We described, at [88] above, the process by which the Hearing Book was prepared and finalised. We also note the following other matters regarding the way the proceeding was conducted. In the course of the hearing before the Tribunal, the Tribunal stated that it should not be assumed that the Tribunal had read every document in the Hearing Book and the Tribunal expected to be taken to the documents relied on by the parties (Tribunal transcript, pp 49, 175). The agreed process regarding the Hearing Book included the opportunity to object to the inclusion of a document, with the documents ultimately remaining in the Hearing Book considered to be “in evidence” (Tribunal transcript, p 50). At one point, the Tribunal indicated that, if the Commissioner wished to rely on a document, beyond a particular statement that had been put to a witness, the witness should be asked about the other aspects sought to be relied on (Tribunal transcript, p 333).

174 There is no dispute between the parties that the two emails (set out at [168]-[169] of the Tribunal’s reasons) and the transcript of the compulsory examination (referred to at [171]) were included in the Hearing Book without objection. There is also no dispute that the documents were not the subject of any cross-examination or any submissions.

175 We now summarise the parties’ submissions. In oral submissions at the appeal hearing, senior counsel for ACN 154 submitted that: a very large number of documents (some 60,000 pages) were forwarded by the Commissioner to the Tribunal; shortly before the hearing, ACN 154 prepared a hearing book comprising ten folders of material; there was discussion at the start of the hearing regarding the approach to documents and the Tribunal indicated that it would not have regard to material that was not referred to; in the course of the hearing, the Tribunal indicated that it wanted to ensure that witnesses were asked about documents before submissions were made about them. In that context, senior counsel submitted that there was an expectation that the Tribunal would not have regard to material that was not referred to; by the end of the trial, every document that had been relied on by the Commissioner had been dealt with by ACN 154. In relation to the emails set out at [168]-[169] of the Tribunal’s reasons, it was submitted that they were not put to Mr Cochineas, and he was not a recipient of the emails or copied in on them; yet the Tribunal used the emails to find (at [172]) that Mr Cochineas and ACN 154 had knowledge (or were at least on notice) that the IPJ Group was exploiting “GST loopholes” (the expression used in the second email). Senior counsel for ACN 154 submitted that the Hearing Book contained another document (the Applicant’s Response to Draft Position Paper) that made clear (at [97], [98]) that the reference to “GST loopholes” in the second email related to a different issue, namely the “IPJ Group’s process of swapping precious metal for scrap material under the second hand provisions of the GST Act”. It was submitted that, had Mr Cochineas been questioned about the emails, he could have explained this.

176 In oral submissions, senior counsel for the Commissioner submitted that it was not a denial of procedural fairness for the Tribunal to refer to material that was before it, whether or not it was referred to in the parties’ submissions. It was submitted that: the parties agreed on the contents of the Hearing Book and the process enabled objections to be taken; ultimately, the contents of the Hearing Book were agreed at the end of the hearing; and the Tribunal referred to the Hearing Book as the “record” on which it would rely. Thus, it was submitted, the two emails and the transcript formed part of the record. Senior counsel disputed that the Applicant’s Response to Draft Position Paper was in the Hearing Book as ultimately agreed; he said that it had been in the Hearing Book but ultimately was removed by ACN 154. Senior counsel submitted that there could be no criticism of the Tribunal in relying on evidence that was not addressed by the parties, where the relevant point was in issue between the parties and addressed. Senior counsel took us in some detail to the transcript of the cross-examination of Mr Cochineas to make good the proposition that the Commissioner squarely put to Mr Cochineas that he understood “what was going on”. It was also submitted that [168]-[171] of the Tribunal’s reasons related only to the IPJ Group and Mr Cochineas’s evidence was not accepted in relation to *all* of the Division 165 Supplying Entities. Thus, it was submitted, [168]-[171] were not the material basis upon which the Tribunal rejected Mr Cochineas’s evidence. Senior counsel indicated that the Commissioner did not accept ACN 154’s explanation of the reference to “GST loopholes” in the second email. It was also submitted by senior counsel for the Commissioner that the impugned findings went to Mr Cochineas’s subjective state of mind, which was a matter put in issue by Mr Cochineas in his affidavit, but was not a relevant matter for the purposes of the Div 165 issues. Those were to be determined, it was submitted, having regard to objective facts.

177 In our view, the Tribunal’s reliance on the two emails set out at [168]-[169] of its reasons and the transcript of compulsory examination referred to at [171] of its reasons, in circumstances where Mr Cochineas was not a party to the emails, was not cross-examined on the documents and the documents were not the subject of any submissions by the parties, constituted a denial of procedural fairness. While it is true that the documents were included in the Hearing Book without objection, in the circumstances it could not have been reasonably expected that the Tribunal would rely on these documents to form an adverse view as to Mr Cochineas’s credit or to make adverse knowledge findings against ACN 154.

178 In *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 (***Alphaone***), the Full Court of this Court (Northrop, Miles and French JJ) stated at 590-591:

It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.

179 The above passage was approved by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 (***SZBEL***) at [32].

180 In *Degning v Minister for Home Affairs* [2019] FCAFC 67, Allsop CJ, after referring to *Alphaone* and *SZBEL*, summarised at [12] the common law position by stating that the applicant was “entitled to have his mind directed to the critical issues or facts on which the decision was likely to turn unless the recognition of the issue was, from the material with which he was provided, an obvious and natural conclusion to draw”. His Honour also stated at [13]:

One should look at the whole of the circumstances including the documents given to [the applicant] to assess whether he had his mind directed to the critical issues or factors on which the decision was likely to turn and to be informed of the nature and content of relevant material. In that assessment, it is relevant to assess what is or is not an obvious or natural evaluation of the material which need not be the subject of particular attention being drawn. The ultimate touchstone is fairness.

181 In the present case, in circumstances where Mr Cochineas was not a party to the two emails, and the two emails and the compulsory examination transcript were not the subject of any cross-examination or any submissions, we consider that ACN 154 was not on notice that the two emails and the transcript of compulsory examination might form the basis of an adverse view being taken of Mr Cochineas’s credit or the basis of adverse knowledge findings against ACN 154. We have formed this view having regard to the way the proceeding was conducted, including the process by which the Hearing Book was prepared and its contents finalised, the volume of documents in the Hearing Book, the length of the hearing, the length and nature of the cross-examination of Mr Cochineas, and the presentation of detailed written and oral submissions.

182 The way in which the Tribunal relied on the documents against Mr Cochineas and ACN 154 is apparent from the first part of [172] of the Tribunal’s reasons. In reliance on those documents (and without the benefit of any oral evidence or any submissions about them), the Tribunal formed the view that Mr Cochineas appeared to have given “incomplete or inaccurate” evidence under oath in the compulsory examination, that his answers in the compulsory examination were “inconsistent” with his affidavit evidence, that he was “disingenuous” in denying in his affidavit evidence the existence of suspicions about the fraudulent activities of the IPJ Group, and that the emails “contradict[ed]” his claims that he was entirely ignorant of any GST-related mischief by the IPJ Group entities. These views were formed in circumstances where, not only was Mr Cochineas not a party to the two emails, the emails were internal to another company, and the reference to “GST loopholes etc” in the second email was unexplained and possibly ambiguous. Yet, the Tribunal relied on the two emails to infer that Mr Cochineas appeared to have given false or misleading evidence in the compulsory examination. The Tribunal then went on to make adverse knowledge findings against ACN 154 in the balance of [172] and in [173]. Although the findings refer to other matters, it is impossible to exclude the possibility (and, to the contrary, it is distinctly possible) that the findings were influenced by the adverse view the Tribunal had taken as to Mr Cochineas’s credit: cf *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at [4], [76], [80], [133]. We note that, in the middle of [172], the Tribunal stated: “We think it highly unlikely Mr Cochineas, an astute businessman, was unaware that the IPJ Group was somehow exploiting ‘GST loopholes’ in circumstances where the GST issues were a topic of special interest to Mr Cochineas and the applicant from, at the latest, early 2012.” The expression “GST loopholes”, used in that sentence, is evidently drawn from the second paragraph of the second email.

183 As noted above, it is true that the two emails and the compulsory examination transcript were included in the Hearing Book. They were therefore available to be relied on in some ways by the Tribunal (for example, by way of context or background). However, that is altogether different from the Tribunal relying on these documents as the basis for taking an adverse view of Mr Cochineas’s credit and making adverse knowledge findings against ACN 154.

184 It is not necessary to determine whether the Applicant’s Response to Draft Position Paper remained in the Hearing Book at the end of the Tribunal hearing. Whether or not the document remained in the Hearing Book, it demonstrates sufficiently for present purposes that there may well have been an explanation had the Tribunal’s concerns regarding the two emails and the compulsory examination transcript been raised at the hearing.

185 In the circumstances, it was unfair to ACN 154 (and Mr Cochineas) for the Tribunal to rely on the two emails and the transcript of compulsory examination in forming the adverse view of Mr Cochineas’s credit and making the adverse knowledge findings against ACN 154.

186 Those findings were, in our view, integral to the Tribunal’s subsequent consideration of whether Div 165 operated. At various points in the balance of the Tribunal’s reasons the Tribunal made adverse findings regarding Mr Cochineas’s knowledge, and thus the knowledge of ACN 154. It is impossible to exclude the possibility (and, to the contrary, it seems distinctly possible) that these findings were influenced by the adverse view the Tribunal had formed as to Mr Cochineas’s credit at [172] of its reasons, on the basis of the two emails and the compulsory examination transcript. We note, in particular, the following findings and observations:

(a) At [198]-[199], in the context of discussing the Majid Group, the Tribunal made adverse knowledge findings against Mr Cochineas and ACN 154.

(b) At [201], in the context of discussing the Majid Group and the failure of ACN 154 to call Mr Faraj, the Tribunal noted that Mr Cochineas’s evidence had “been found wanting in a number of respects, as we have explained”. It also referred to “the shortcomings in the evidence that was led”.

(c) At [223], in the context of discussing MAK, the Tribunal made adverse knowledge findings against Mr Cochineas.

(d) At [224], at the conclusion of the detailed sections dealing with each of the Division 165 Supplying Entities, the Tribunal made “further findings” relating to the Division 165 Supplying Entities generally. In particular the Tribunal found that:

(i) ACN 154 was aware that the Division 165 Supplying Entities were acquiring investment-grade bullion from the Dealers (especially in the case of its related entity, ABC NSW);

(ii) ACN 154 more than likely knew the Division 165 Supplying Entities were altering the bullion so it no longer satisfied the investment form requirement of the definition of “precious metal” so as to make taxable supplies to ACN 154; and

(iii) ACN 154 was on notice these suppliers were not remitting the GST because it would have been uneconomic for them to do so.

(e) At [252], in the context of considering whether there was a “scheme”, the Tribunal found that ACN 154 “knew it was uneconomic for the Division 165 Supplying Entities to sell scrap gold to it at a price that was effectively less (on a GST-exclusive basis) than that for which the Division 165 Supplying Entities were buying essentially the same gold, in the form of precious metal from the Dealers, unless they were not remitting the GST on those taxable supplies”.

(f) At [271], in the course of considering the manner in which the scheme was entered into or carried out (s 165-15(1)(a)), the Tribunal stated: “As we have explained above, Mr Cochineas and Ms Simpson – but especially Mr Cochineas – were on notice (and in some cases had actual knowledge) of the fraudulent activities of the Division 165 Supplying Entities. That state of knowledge must be attributed to the applicant.” Those sentences were evidently based on the Tribunal’s earlier findings, including those at [172] and [224]. The language used in [271] (in particular, the reference to being on notice of “fraudulent activities”) reflects language used in [172].

(g) At [279], in the context of considering s 165-15(1)(k) and (l), the Tribunal stated that ACN 154 was “at best, wilfully blind” to the creation of a contrived market in gold transactions.

(h) At [282], at the end of the section dealing with dominant purpose and principal effect, the Tribunal against stated that ACN 154 was “at least, wilfully blind”.

187 While it is true that the question of dominant purpose is to be objectively assessed, the Tribunal’s adverse assessment of Mr Cochineas’s credit may have influenced its findings on objective facts, including whether (as the Commissioner had contended) ACN 154 ought to have known relevant matters. Thus we do not consider it possible to isolate and put to one side the Tribunal’s reliance on the two emails and the compulsory examination transcript on the basis of the objective nature of the test under Div 165.

188 We note for completeness that, to the extent that ACN 154 submits that the Tribunal’s knowledge findings against ACN 154 went beyond the case advanced by the Commissioner before the Tribunal, we do not accept that part of ACN 154’s argument. ACN 154 relies on the Commissioner’s statement before the Tribunal that he was *not* alleging that ACN 154 was a party to the fraud being perpetrated by the Division 165 Supplying Entities, namely, the tax evasion (see the Tribunal transcript, p 738 and the Tribunal’s reasons at [225]). However, that statement was expressed in quite specific terms, referring to not alleging that ACN 154 was a *party* to the tax evasion. The Tribunal’s findings were not inconsistent with that limitation on the Commissioner’s case.

189 In light of the above, it is established that the Tribunal denied ACN 154 procedural fairness and that the denial was material. It follows that the Tribunal’s conclusion that Div 165 operates must be set aside and the issue of the operation of Div 165 re-determined. In these circumstances, it is strictly unnecessary to deal with the remaining grounds. However, we will deal with those grounds, briefly, for the sake of completeness.

### The witness issue

190 Question 4 in the notice of appeal is whether ACN 154’s failure to call witnesses to corroborate the evidence of Mr Cochineas “prevented” the Tribunal from accepting the evidence adduced by ACN 154. The associated grounds are 12, 14 and 15. By these grounds, ACN 154 contends that the Tribunal erred at [179], [201] and [208] in concluding that ACN 154’s failure to call certain witnesses to corroborate Mr Cochineas prevented the Tribunal from being satisfied that ACN 154 had discharged its onus. While question 4 and the associated grounds may raise a question of law in the abstract, it is necessary to consider whether they accurately reflect the way in which the Tribunal dealt with the absence of certain witnesses.

191 The Tribunal made observations regarding ACN 154’s failure to call certain witnesses at various points in its reasons. In particular, the issues was discussed at [176]-[179], at the conclusion of the section dealing with facts relating to the IPJ Group. The Tribunal stated at [176] that ACN 154 did not call Ms Simpson, Mr Catanzariti, Mr Gregg, Ms Ronaldson or Ms Baker to give evidence and did not provide any explanation as to why it could not have done so. The Tribunal noted Mr Cochineas’s evidence regarding the demarcation of responsibilities among the board of ACN 154, but did not consider it followed that Ms Simpson and Mr Gregg were not knowledgeable about the relevant activities of ACN 154. The Tribunal stated that it would have expected to hear from Ms Simpson given the close relationship between ACN 154 and ABC NSW and the fact ABC NSW was also a key entity in the relevant supply chains. Similarly, the Tribunal stated, Mr Catanzariti, Ms Ronaldson, Ms Baker and Mr Gregg would have undoubtedly provided some assistance to the Tribunal in explaining some of the emails and other documents referenced throughout the Tribunal’s decision.

192 The Tribunal referred, at [177], to ACN 154’s submissions regarding the applicability of the rule in *Jones v Dunkel* (1959) 101 CLR 298. The Tribunal stated that, while the submissions were instructive, it needed to be recalled that “the Tribunal is not bound by the rules of evidence [but] may inform itself on any matter in such manner as it thinks appropriate”: s 33(1)(c) of the AAT Act. The Tribunal stated that the rules of evidence were useful guide, but not ultimately determinative. The Tribunal then stated at [178]-[179]:

178. When one approaches the task on that basis, it becomes apparent that the rule in *Jones v Dunkel* is ultimately a short-hand reference to an underlying proposition that reflects common sense. If a party advances a factual matrix but elects not to lead apparently relevant evidence (whether in the form of witness testimony or documents or otherwise) that one would naturally expect the party to produce to substantiate what is claimed, then – in the absence of some satisfactory explanation – one is entitled to be suspicious about what that witness or document would have said and why they or it are not produced. In a case like this where the applicant bears the onus of proof, a decision not to lead relevant evidence in the applicant’s possession or control without proper explanation will certainly not assist the applicant in proving their case. The Tribunal may also, in appropriate cases, draw an adverse inference from a failure to lead evidence that was presumptively relevant and available to the applicant in the absence of a proper explanation.

179. **We do not infer the uncalled witnesses would necessarily have given adverse evidence in this case**, but the surprising failure to call those witnesses without an adequate explanation has consequences for the applicant even so. The applicant bears an evidentiary burden. It relies in particular on the evidence of Mr Cochineas. In doing so, it has placed all of its evidentiary eggs in the one basket – a risky strategy in a case where some of the evidence is contentious and credit is an issue. As it happens, for reasons we have explained, we have concerns about the evidence of Mr Cochineas. It has been found wanting. The applicant’s failure to call the identified witnesses to corroborate his evidence and fill any gaps underlines those shortcomings, and **prevents us from being satisfied the applicant has discharged its onus** on this issue.

(Emphasis added.)

193 The Tribunal also referred to ACN 154’s failure to call Mr Faraj at [201] (in the context of considering the facts relating to the Majid Group) and Mr Rami Askary at [208] (in the context of considering the facts relating to Gold Buyers), adopting a similar approach.

194 ACN 154 submits that the Tribunal’s approach was contrary to law for two reasons. First, it is submitted that there is no requirement in either law or logic for a taxpayer to adduce corroborative evidence or to call all witnesses who might give relevant evidence to discharge their onus under s 14ZZK of the *Tax Administration Act 1953* (Cth): *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1 at 10-11; *Federal Commissioner of Taxation v Cassaniti* (2018) 266 FCR 385; see also *Evidence Act 1995* (Cth), s 164. Secondly, ACN 154 submits that the absence of a witness does not in any way diminish the cogency of the proof otherwise offered by a party: *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345, especially at [153].

195 In our view, ACN 154 has not established any error of law in the Tribunal’s approach to the absence of evidence from the persons referred to above. The Tribunal made clear at [179] that it was *not* inferring that the uncalled persons would have given evidence adverse to ACN 154’s case. In substance, the Tribunal was merely observing that, in the absence of further evidence, for example from the uncalled persons, ACN 154 had not discharged its onus. No error is shown in such observations.

### The no evidence issue

196 The issue is whether, as contended by ACN 154, there was ‘no evidence’ for certain findings made by the Tribunal. This issue is raised by question of law 5 and grounds 10A, 11, 13, 16, 18, 19, 22, 22A, 23, 24, 26 and 27. Each of these grounds includes a statement that the relevant finding was “not open” to the Tribunal. In its submissions in reply, filed before the appeal hearing, ACN 154 clarified that it was relying on a ‘no evidence’ argument, which gives rise to a question of law.

197 The following principles are applicable generally to these grounds:

(a) whether a fact is supported by any evidence is a question of law (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 (***Bond***) at 355-356; *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at [91]);

(b) likewise, whether a particular inference can be drawn from facts found is a question of law; that is because, before an inference may be drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions (*Bond* at 355-356; *Minister for Immigration and Multicultural Affairs v Al-Miahi* (2001) 65 ALD 141 (***Al-Miahi***) at [34]);

(c) on the other hand, there is no error of law simply by making a wrong finding of fact (*Al-Miahi* at [34]);

(d) if there is *some* basis for an inference (in other words, the particular inference is reasonably open), even if that inference appears to have been drawn as a result of illogical reasoning, no error of law on this basis is established (*Bond* at 355-356; *Al-Miahi* at [34]); and

(e) permissible inference may be based on direct evidence or circumstantial evidence; the mere fact that evidence is circumstantial rather than direct does not convert a permissible inference based on that evidence into impermissible conjecture (*Rawson Finances v Federal Commissioner of Taxation* (2013) 296 ALR 307 at [88], citing *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at [80]-[91]).

198 By ground 10A, ACN 154 contends that the Tribunal erred in finding (at [174]) that ACN 154 directly benefited from the GST not being paid by the IPJ Group to the Commissioner. The Tribunal’s finding needs to be understood having regard to the whole of [174]. The Tribunal stated at that paragraph:

We find that, effectively, both the applicant and the IPJ Group directly benefited from the GST not being paid by the IPJ Group to the Commissioner. For the IPJ Group, the price paid to them was attractive, but *only* if the GST was not remitted by them to the Commissioner – a simple case of tax evasion. On the other hand, the price paid was attractive to the applicant *only* if the GST included in the price paid could be claimed by it as an input tax credit. In simple terms, if the applicant was unable to claim the GST as an input tax credit, it would not have paid *that* price to the IPJ Group. This is because the price at which the applicant was selling precious metal to the Dealers would have been less than the GST-inclusive price at which it bought the scrap gold and this would not have been economically feasible.

199 Reading the paragraph as a whole, the substance of the Tribunal’s finding (insofar as it concerned ACN 154) was that ACN 154 would not have entered into the relevant transactions (acquisitions of scrap gold) at the prices it did unless the transactions were taxable supplies in respect of which ACN 154 could claim an input tax credit for the GST it paid. This inference was reasonably open on the basis of the primary facts found by the Tribunal at [36]-[98] (the background facts section) and at [142]-[167] (in relation to the IPJ Group). We therefore reject this ground.

200 By ground 11, ACN 154 contends that the Tribunal erred in finding (at [175]) that ACN 154 directly benefited from the IPJ Group’s fraudulent conduct by claiming input tax credits on its acquisitions from the IPJ Group. Again, it is necessary to set out the paragraph to understand the Tribunal’s finding. In [175] the Tribunal stated:

It was *those* input tax credits that propped up the arrangement and made it beneficial. If the claims for input tax credits had not been made by the applicant or if GST had been remitted by the IPJ Group, the arrangement would have fallen over. It is also worth noting that while it is true the applicant and ABC NSW were not the perpetrators, they were beneficiaries of the IPJ Group’s fraudulent conduct. The applicant directly benefited by claiming the input tax credits and the applicant and ABC NSW also indirectly benefited from the margins made on the increased turnover in the sale of precious metal in an artificial market.

201 Reading the paragraph as a whole, the substance of the Tribunal’s finding was that the ability of ACN 154 to claim input tax credits in respect of the relevant acquisitions was critical to the whole arrangement; but for those input tax credits, the relevant acquisitions would not have taken place, at least at the prices that they did. Understood in this way, the inference was reasonably open on the basis of the primary facts found by the Tribunal at [36]-[98] (the background facts section) and at [142]-[167] (in relation to the IPJ Group). We therefore reject this ground.

202 By ground 16, ACN 154 contends that the Tribunal erred in finding (at [211]) that Mr Cochineas was aware when scrap gold had been sourced from Mr Bourke. In its outline of submissions, ACN 154 submits that there was no evidence to support the Tribunal’s finding that Mr Cochineas knew that Mr Bourke was the source of the scrap gold supplied to ACN 154 by MAK. In his outline of submissions, the Commissioner submits that the finding is supported by the oral evidence of Mr Cochineas at Tribunal transcript, pp 209, 215. Having reviewed those pages, they do not appear to provide evidence to support the proposition that Mr Cochineas knew that *Mr Bourke* was the source of the scrap gold supplied to ACN 154 by MAK. It may be, however, that what the Tribunal was intending to state in the first sentence of [211] was that Mr Cochineas was aware when scrap gold supplied by MAK had been sourced from the client known as the *Golden Goose* (who was in fact Mr Bourke). If that is what the Tribunal intended to say, Mr Cochineas’s evidence at the transcript pages referred to by the Commissioner supports that proposition. We accept, however, that there was no evidence for the finding in the terms made by the Tribunal. This ground is made out.

203 By ground 19, ACN 154 contends that the Tribunal erred in finding (at [216]) that Mr Kavalis “categorically confirmed” that altering investment grade bullion does not make any commercial sense. In its outline of submissions, ACN 154 submits that the Tribunal’s finding misstates the evidence of Mr Kavalis (who was an expert witness called by ACN 154). ACN 154 submits that Mr Kavalis was only referring to bars “that came either from the refinery or from a dealer who can prove the provenance of the bar”; Mr Kavalis and Dr Murray gave evidence that there were sound reasons for cutting or melting a bar when provenance was not proved. In his outline of submissions, the Commissioner submits that the Tribunal’s finding was consistent with Mr Kavalis’s evidence, referring to Tribunal transcript, p 433, and Mr Kavalis’s report dated 12 December 2017 at [11]. On the basis of Mr Kavalis’s oral evidence at p 433, we are satisfied that there was evidence to support the Tribunal’s finding. We therefore reject this ground.

204 By ground 22, ACN 154 contends that the Tribunal erred in finding (at [246] and [279]) that there was “sophisticated planning and interaction between the parties [which included ACN 154] that were involved in each of the supply chains”. ACN 154 submits that: once it is accepted that ACN 154 had no knowledge of any fraudulent activities, the Tribunal’s finding that there was “sophisticated planning and interaction between the parties” is without foundation; the only evidence as to planning on behalf of ACN 154 was its entirely uncontroversial co-ordination with its related party, ABC NSW about supplies of precious metal. In our view, the Tribunal’s finding that there was “sophisticated planning and interaction between the parties that were involved in each of the supply chains” was reasonably open on the basis of the primary facts found, and the evidence referred to, by the Tribunal at [136]-[223] (excluding [172]-[173] and the findings based on those paragraphs). The finding does not appear to depend on the adverse knowledge findings that are the subject of the procedural fairness issue. The finding relates to practical matters rather than to whether ACN 154 had knowledge (or was on notice) of particular matters. The finding refers to “sophisticated” planning and interaction; “sophisticated” is not the same as “fraudulent”. We therefore reject this ground.

205 By ground 22A, ACN 154 contends that the Tribunal erred in finding (at [248]) that ACN 154’s pricing was a characteristic that set ACN 154 apart from what other refiners would do. ACN 154 submits that: the only evidence before the Tribunal regarding pricing was the unchallenged evidence of ACN 154 that its pricing was within the range charged in the market, and that ACN 154 paid all its suppliers a discount to the spot price plus GST; there was no evidence that this pricing was anything different to what other Australian refiners did. In the Commissioner’s outline of submissions, he submits that the inference drawn by the Tribunal was reasonably open for the reason stated by the Tribunal. The reason stated by the Tribunal (at [248]) was that ACN 154 acquired the scrap gold from the Division 165 Supplying Entities at a GST-inclusive price that always exceeded the spot price; the Tribunal stated that no refiner would pay those prices unless they were entitled to claim the input tax credits. Reading the paragraph as a whole, we consider the substance of the Tribunal’s finding to be that contained in the last sentence, namely that no refiner would pay those prices unless they were entitled to claim the input tax credit. There was a proper basis for that finding as a matter of logic, having regard to the evidence generally. We therefore reject this ground.

206 By ground 23, ACN 154 contends that the Tribunal erred in finding (at [250]) that: ACN 154 “made a profit because of the input tax credits”; there was no evidence that ACN 154 paid a higher price because the supplies to ACN 154 were taxable supplies of scrap gold; and that GST was not factored into the prices charged by the Division 165 Supplying Entities to ACN 154. ACN 154 submits that, contrary to the Tribunal’s finding, the input tax credits merely reflected amounts of GST that had been paid by ACN 154 to its suppliers; the input tax credits were therefore neutral in relation to ACN 154’s profit. These propositions were demonstrated in oral submissions by reference to worked examples that showed that, whether the rate of GST was higher or lower was neutral so far as ACN 154’s profit was concerned; it followed that the input tax credits could not represent profit. In response, the Commissioner submits that it was open to the Tribunal to find that ACN 154 made its profit because of the input tax credits, having regard to the evidence that ACN 154 could not viably have traded with the Division 165 Supplying Entities otherwise than at a loss without the input tax credits. The Commissioner submits that ACN 154 obtaining the input tax credits enabled the trading to continue, enabled the course of conduct in which the Division 165 Supplying Entities engaged, and led to a dramatic increase in the applicant’s turnover. In our view, the Tribunal’s finding that ACN 154 made a *profit* from the input tax credits it claimed is not supported by any evidence. The input tax credits merely reflected the GST that had been paid by ACN 154 to its suppliers; in that sense, as ACN 154 submits, they were neutral. That is not to say that ACN 154’s turnover, and its actual profit, did not increase as a result of the business model that it adopted and the transactions that it entered into; it is to say that there was no evidence for the proposition that it made its profit from the input tax credits that it claimed. This ground is made out.

207 By grounds 13, 18, 24, 26 and 27, ACN 154 contends that the Tribunal erred in making certain findings (at [199], [224], [252], [279] and [282]). The findings challenged by these grounds relate to whether ACN 154 had knowledge (or was on notice) of certain matters. In circumstances where the relevant findings may be founded, at least in part, on the findings at [172]-[173] and we have decided that there was a denial of procedural fairness associated with those findings, we consider it unnecessary to determine, and preferable not to determine, whether (apart from the findings at [172]-[173] and any findings based on those findings) the findings that are challenged by these grounds were reasonably open.

### Whether the Tribunal otherwise erred in law in its application of Div 165

208 We now consider the remaining questions of law and grounds relating to Div 165 of the GST Act. These are questions of law 6-8 and grounds 20, 21, 25 and 28-30.

209 Question of law 6 is: “Whether a series of independent and uncoordinated events constitute a ‘scheme’ within the meaning of s.165-10(2).” The two related grounds are 20 and 21. Ground 20 states that the Tribunal erred in finding (at [244]) that there was a scheme as defined in s 165-10(2). Ground 21 states that the Tribunal should have concluded that neither the wider scheme nor the narrower scheme was a scheme as defined in s 165-10(2).

210 The difficulty with question of law 6 is that there was no finding by the Tribunal that the relevant events were “independent and uncoordinated”. To the contrary, the Tribunal found, at [246], that there was “sophisticated planning and interaction between the parties that were involved in each of the supply chains”, a finding that we have found, above, was reasonably open. Further, as noted at [117] above, the Tribunal found that a substantial proportion of the scrap gold supplied by the Division 165 Supplying Entities to ACN 154 was acquired by those entities (directly or indirectly) from the Dealers (that is, ABC NSW and Ainslie) and was acquired in precious metal form: see the Tribunal’s reasons, [151], [154], [156], [158], [159], [161], [189], [196], [197], [204]-[206], [218]-[220], [223], [224]. Thus the premise of question of law 6 is absent. Ground 20 and 21 do not identify or raise any other question of law.

211 We note for completeness that, insofar as ACN 154 takes issue in its submissions with the Tribunal’s description of the arrangement as a ‘round robin’ arrangement (eg at [246]), that description (which applied to only some of the gold – see the Tribunal’s reasons at [158]) was in our view reasonably open on the basis of the primary facts found, and the evidence referred to, by the Tribunal at [136]-[223] (excluding [172]-[173] and the findings based on those paragraphs).

212 In any event, a series of independent and uncoordinated events may constitute a “scheme” within the meaning of s 165-10(2): cf *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 16 at [47] per Gummow and Hayne JJ; *Federal Commissioner of Taxation v Star City Pty Ltd* (2009) 175 FCR 39 at [204]-[213] per Dowsett J.

213 Questions of law 7 is (in summary) whether any entity entered into the scheme, or part of the scheme, for the dominant purpose of ACN 154 getting a GST Benefit. Question of law 8 is whether the principal effect of the scheme, or part of the scheme, was for ACN 154 to get the GST Benefit from the scheme. Grounds 25 and 28-30 are as follows:

25. The Tribunal erred in finding (Reasons [268]) that “that the Applicant’s entitlement to the input tax credits was more important to the operation of the scheme than the GST liabilities evaded by the Division 165 Supplying Entities”. That finding was not open to the Tribunal.

…

28. The Tribunal erred in concluding (Reasons [269], [279], [280]) that the Applicant and the Division 165 Supplying Entities entered into the scheme with the dominant purpose of the Applicant getting a GST benefit from the scheme.

29. The Tribunal should have concluded: (1) the Applicant’s dominant purpose was to obtain the refining material; and (2) the Division 165 Supplying Entities dominant purpose was to fraudulently obtain the benefit of the GST component of the sale price by knowingly failing to remit GST to the Commissioner.

30. The Tribunal erred in concluding (Reasons [281]) that the principal effect of the scheme, or part of it, is that the Applicant obtained the GST benefit. The Tribunal should have concluded: (1) that the principal effect of the scheme was to enable the Division 165 Supplying Entities to sell gold to third party purchasers as a taxable supply thereby enabling those suppliers to recover a higher GST inclusive price and fail to remit that GST to the Commissioner; and (2) that the GST benefit received by the Applicant was an incidental consequence of the scheme.

214 Although ground 25 is a ground containing the contention that a finding was “not open”, we consider this ground in this section of the reasons, rather than earlier, due to its relationship with the “scheme”.

215 These questions of law and grounds (which relate to mixed questions of fact and law) may raise a question of law if, for example, ACN 154 contends that the Tribunal adopted a wrong approach to the task or that it made an error of law: see *Haritos* at [126], [200]. Further, ground 25 raises a question of law as ACN 154 contends there was ‘no evidence’ for the Tribunal’s finding.

216 ACN 154’s submissions regarding *dominant purpose* and *principal effect* can be summarised as follows:

(a) Having regard to the factors in s 165-15(1), even on the erroneous findings made by the Tribunal there was no rational basis for the Tribunal to conclude that any entity entered into or carried out the scheme or part of the scheme for the dominant purpose (ie the “ruling, prevailing, or most influential purpose” – *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 (***Spotless***) at 416) of ACN 154 getting a GST benefit, which was the input tax credit for its acquisition of a taxable supply and *for which ACN 154 paid* the whole of the GST-inclusive consideration to the supplier.

(b) Unknown to ACN 154, the Division 165 Supplying Entities altered the form of the gold such that the supply of gold to ACN 154 would be a taxable supply, enabling those entities to charge a GST-inclusive price to ACN 154. Those entities failed properly to account for that GST liability to the Commissioner, such that the entities were enriched by the GST which they had collected from ACN 154. The conclusion to be drawn from this, especially having regard to both the form and substance of the scheme, the manner in which it was carried out and the change in financial position of the Division 165 Supplying Entities is that their dominant purpose in taking the steps they took in the “scheme” was to obtain the benefit *for themselves* of the GST component of the price paid *by ACN 154*. By retaining the GST, the Division 165 Supplying Entities self-evidently improved their financial position – s 165-15(1)(h); cf the Tribunal’s reasons at [277].

(c) The dominant purpose of ACN 154 was not to secure an input tax credit but to acquire the refining material it needed to produce its end-product, which included the production of precious metal. It defies logic to conclude, as the Tribunal did at [279], that the dominant purpose of a taxpayer acquiring a taxable supply of goods that are critical to its business is not to obtain the goods themselves but simply to obtain the input tax credit applicable to them, the entitlement to which arose because ACN 154 had already paid that amount to the suppliers in the price of the material which it purchased. This conclusion follows when regard is had to the factors at s 165-15(1)(b), (c), (f) and (g). The input tax credit entitlement of ACN 154 simply equalled the amount paid to its suppliers on account of GST.

(d) ACN 154’s profit was independent of the rate of GST. In contrast, the benefit to the Division 165 Supplying Entities was directly referable to the GST.

(e) The Tribunal’s conclusion that ACN 154’s entitlement to input tax credits was more important to the scheme than the GST liabilities evaded by the Division 165 Supplying Entities (at [268]) cannot stand. The availability of an input tax credit was an expected and natural incident of the payment of GST-inclusive prices in the conduct of an enterprise. It was central to its business and the very object of s 38-385 that it would be entitled to input tax credits for GST paid on its inputs.

(f) That is not to elevate the purpose of ACN 154 obtaining an input tax credit to the kind of purpose proscribed by s 165-15: see *Mills v Federal Commissioner of Taxation* (2012) 250 CLR 171 (***Mills***) at [66] per Gageler J. In *Mills*, Gageler J was concerned with a purpose test with a lower threshold, but the reasoning applies all the more forcefully when the proscribed purpose is the “sole or dominant purpose”. The reasoning also holds for the various suppliers who, in the Tribunal’s view, had the dominant purpose of ensuring that ACN 154 would obtain input tax credits on the acquisitions made by it.

(g) The Tribunal has impermissibly substituted a ‘but for’ test in place of the statutory test of dominant purpose. The mere fact that, on the Tribunal’s finding, the scheme would have “fallen over if the applicant had not been able to claim the input tax credits” (at [268]) does not inform the conclusion as to the dominant purpose of the scheme. A step may be necessary for the efficacy of a scheme but yet subordinate to another purpose.

(h) Further, it was not the *principal effect* of the scheme that ACN 154 received the GST benefit. The principal effect of the scheme was to enable the Division 165 Supplying Entities to sell material to third party purchasers as a taxable supply, thereby enabling those suppliers to recover a higher GST-inclusive price and fail to remit that GST to the Commissioner. That is the step that cannot be explained other than by reference to tax evasion on the part of the Division 165 Supplying Entities. The “scheme” would have this effect whether or not ACN 154 (or indeed anyone else) could obtain an input tax credit. The availability of an input tax credit was nothing more than an incidental consequence and far from the principal effect of the scheme.

217 In oral submissions, senior counsel for ACN 154, submitted that two matters were at the heart of the Tribunal’s conclusion as to dominant purpose. The first was the Tribunal’s finding that ACN 154’s *profit* was obtaining from the input tax credits. (This matter has been dealt with at [206] above.) The second was the proposition that ACN 154 was not an innocent party. It was submitted that this was built upon the Tribunal’s view that Mr Cochineas’s evidence could not be believed. (This matter has been dealt with above, in connection with the procedural fairness issue.)

218 Senior counsel for ACN 154 also submitted that the scheme was explicable only by the desire of the rogues to pocket the cash from the GST. It was submitted that the Tribunal erroneously put that benefit out of its mind and treated the rogues as having suffered a detriment (at [277] of the reasons). It was also submitted that the Tribunal asked itself the wrong question; that is, that the Tribunal asked what made the scheme work, rather than what the scheme was working to achieve.

219 In our view, ACN 154 has not established that the Tribunal adopted a wrong approach, or made an error of law, in its consideration of *dominant purpose* and *principal effect* for the purposes of s 165-5, apart from the grounds considered earlier in these reasons.

220 To a large extent, ACN 154’s submissions take issue with the merits of the Tribunal’s conclusions as to dominant purpose and principal effect rather than identifying a wrong approach or an error of law.

221 Insofar as ACN 154 contends that there was ‘no evidence’ for the Tribunal’s finding (at [268]) that ACN 154’s entitlement to the input tax credits was “more important to the operation of the scheme than the GST liabilities evaded by the Division 165 Supplying Entities”, this finding needs to be read in the context of the whole of [268] (see [123] above). As the Tribunal stated in that paragraph, without the entitlement to the input tax credits, ACN 154 would not have paid the prices that it did to the Division 165 Supplying Entities and, consequently, there would have been no acquisition of precious metal by the Division 165 Supplying Entities from the Dealers. Further, the Tribunal stated, there would have been no defacing of that precious metal, no taxable supplies in altered form to ACN 154, no processing of the metal by ACN 154, and no sale of an equivalent amount of precious metal back into the market by ACN 154 to the Dealers. Having regard to these matters, it was reasonably open to the Tribunal to make the finding.

222 Insofar as ACN 154 submits that the Tribunal took a wrong approach by adopting a ‘but for’ test rather than the statutory test of dominant purpose, we do not accept that the Tribunal fell into this kind of error. The Tribunal considered dominant purpose by reference to the matters listed in s 165-15. That consideration was properly directed to whether it would be reasonable to conclude that an entity that entered into or carried out the scheme did so with the dominant purpose of ACN 154 obtaining the input tax credits: see the Tribunal’s reasons at [269]-[280]. For example, in connection with the manner in which the scheme was entered into or carried out (s 165-15(1)(a)), the Tribunal stated at [270]:

As to s 165-15(1)(a) and the manner in which the scheme was entered into or carried out (in both of its formulations), this involved the acquisition of investment-grade bullion, the deliberate alteration of the bullion and the subsequent supply of scrap gold to the applicant for refining. Those transactions and course of conduct occurred systematically on an almost daily basis over a period of at least 20 months from the start of the applicant’s business, with increasing frequency and involving increasingly large volumes and values. The applicant’s dealings with the Division 165 Supplying Entities including its lax due diligence procedures, as well as its rapid out-turn and favourable payment terms, facilitated the efficient perpetuation of the scheme. The applicant’s supplies of investment-grade bullion to the Dealers (one of which was a related entity) were also instrumental to the ongoing and increasing volume of high-value transactions carried out by the Division 165 Supplying Entities.

223 Also in connection with s 165-15(1)(a), the Tribunal stated at [271] that there “was no commercial reason for the round robin arrangement except for the GST consequences arising from the different treatments of gold”. By way of further example, in connection with the form and substance of the scheme (s 165-15(1)(b)), the Tribunal stated at [272] that the form and substance of each scheme (that is, the wider and the narrower schemes pleaded by the Commissioner) “was to create GST liabilities in the Division 165 Supplying Entities and corresponding entitlements to input tax credits in the applicant for which the Commonwealth was liable to make payment to the applicant”. The Tribunal added: “There was no economic substance to the wider or narrower scheme as it was not an ordinary commercial arrangement. It was an arrangement for the applicant to claim input tax credits.” Thus we are not satisfied that the Tribunal misdirected itself as to the question or that it erred in law by adopting a ‘but for’ causation approach.

224 Insofar as ACN 154 submits that the dominant purpose of the scheme was for the Division 165 Supplying Entities to obtain the GST (which they would fail to remit to the Commissioner), rather than for ACN 154 to obtain input tax credits, this submission seems to go to the merits of the Tribunal’s conclusion. In any event, we consider that it was open to the Tribunal to view the obtaining (by ACN 154) of the input tax credits and the obtaining (by the supplying entities) of the GST as comprising *one purpose*, in circumstances where the two were inextricably linked: cf *Federal Commissioner of Taxation v Ludekens* (2013) 214 FCR 149 at [243].

225 Further, ACN 154’s submission has echoes of the position rejected by the High Court in *Spotless*. In that case, as Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ noted at 414, the majority of the Full Federal Court held that Pt IVA of the *Income Tax Assessment Act 1936* (Cth) (on which Div 165 of the GST Act is modelled, albeit there are some differences) did not apply to the scheme. The majority in the Full Federal Court decided that the “dominant purpose” of the taxpayers was to obtain the maximum return on the money invested after the payment of all applicable costs, including tax, and not to obtain a “tax benefit”. After setting out passages from the judgment of Cooper J (who formed part of the majority in the Full Federal Court), including a passage referring to a “rational commercial decision”, the plurality in the High Court stated (at 415):

The references in this passage on the one hand to a “rational commercial decision” and on the other to the obtaining of a tax benefit as “the dominant purpose of the taxpayers in making the investment” suggest the acceptance of a false dichotomy. … A person may enter into or carry out a scheme, within the meaning of Pt IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business.

226 While the facts are very different, this passage nevertheless tends to indicate the flaw in ACN 154’s submission. The fact that the Division 165 Supplying Entities were pursuing their own (dishonest) gain is not necessarily inconsistent with a conclusion that it would be reasonable to conclude that an entity that entered into or carried out the scheme did so with the dominant purpose of ACN 154 obtaining the input tax credits.

227 Insofar as ACN 154 submits that the Tribunal erred, in connection with s 165-15(1)(h) and (i), by stating that the scheme (in either of its formulations) had “a deleterious impact on their fortunes [ie the fortunes of the Division 165 Supplying Entities] because they incurred a GST liability that made the transactions uncommercial”, it was reasonably open to the Tribunal to take this approach. The Tribunal was well aware, as indeed it acknowledged in [277], that the “authors of the fraud benefitted from the tax evasion”. Nevertheless, it was open to the Tribunal to view the scheme as having an adverse effect on the financial position of the supplying entities, for the reason it gave.

228 For these reasons, we reject grounds 25 and 28-30 insofar as they raise matters that are additional to the grounds considered earlier in these reasons.

### Conclusion on the issues relating to Div 165

229 It follows from our conclusion in relation to the procedural fairness issue that the Tribunal’s conclusion relating to Div 165 must be set aside and the issue re-determined. This raises the question whether that redetermination should be undertaken by the Tribunal or by this Court.

230 Although this Court has power under s 44(7) of the AAT Act to make findings of fact, in the circumstances of this case it would be going beyond the proper role of the Court for this Court to re-determine whether Div 165 operates. Among other things, in the process of re-determining the issue it will be necessary to consider afresh, and making findings about, whether (as the Commissioner contended) ACN 154 ought to have known certain matters. An intensive fact-finding exercise of that nature goes beyond the proper role of the Court in an appeal on a question of law under s 44 of the AAT Act. Accordingly, we consider it necessary to remit the matter to the Tribunal for determination according to law (that is, to re-determine whether Div 165 operates). We acknowledge that this is an unpalatable result given the length of the Tribunal hearing, but for these reasons we have given we consider this course to be necessary. Further, in the circumstances, we consider it appropriate that the Tribunal be differently constituted.

## Issues relating to penalties

231 By ground 31 in the notice of appeal, ACN 154 contends that the Tribunal erred in finding (at [290]-[292]) that ACN 154 was liable for an administrative penalty pursuant to the relevant provision. It is contended that the Tribunal should have held that ACN 154 was not liable to an administrative penalty because it was not reckless but took reasonable care in relation to its claims for input tax credits. There is no corresponding question of law in the notice of appeal. In our view, this ground does not raise a question of law. It is therefore not open to ACN 154 to pursue this ground within the framework of this appeal. That said, it will be necessary for the penalties to be adjusted to reflect the conclusions that we have reached in relation to the other issues, discussed above.

## Conclusion

232 For these reasons, we have reached the conclusions summarised at [15] above. We will make orders to the effect that:

(a) the appeal be allowed;

(b) the decision of the Tribunal be set aside; and

(c) the matter be remitted to the Tribunal (differently constituted) for determination according to law.

233 It appears to be appropriate that the Commissioner pay ACN 154’s costs of the proceeding. We will make an order to this effect, but will provide that if either party wishes to seek a different costs order, the party may within 14 days file and serve an outline of submissions (of no more than three pages) on costs. In that event, the other party may within a further 7 days file and serve a responding submission (of no more than three pages). We would propose to deal with any issue of costs on the papers.

|  |
| --- |
| I certify that the preceding two hundred and thirty-three (233) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Perram, Moshinsky and Thawley. |

Associate:

Dated: 6 November 2020