

## VICTORIAN GAMING MACHINE ENTITLEMENTS NOT DEDUCTIBLE ON REVENUE ACCOUNT

Written by Victor Hamit

In [Commissioner of Taxation of the Commonwealth of Australia v Sharpcan Pty Ltd \[2019\] HCA 36](#), the High Court of Australia unanimously decided in a short (25 pages) and direct decision that the purchase of Victorian Gaming Machine Entitlements (“GMEs”) was on capital account and therefore, not deductible on revenue account. Nor was the purchase price deductible under [section 40-880 of the Income Tax Assessment Act 1997](#) (“the Act”) as the expenditure was not incurred to preserve, but not enhance, the value of goodwill and the value of GMEs was not solely attributable to the effect which they had on goodwill.

The deductibility of expenditure on GMEs has been debated by Tax Advisors for many years. Sharpcan Pty Ltd (“the Taxpayer”) was the sole beneficiary of the Daylesford Royal Hotel Trust (“the Trust”). The Taxpayer was successful at the Administrative Appeals Tribunal (“AAT”) in arguing that the expenditure of \$600,300 on GMEs was deductible on revenue account. The Commissioner appealed to the full Federal Court but the Taxpayer was again successful. The Commissioner then appealed to the High Court of Australia and was ultimately successful in its argument that the expenditure on GMEs was not on revenue account nor deductible under the specific provisions of section 40-880 of the Act.

The Trust acquired, on 8 August 2005, the business of the Royal Hotel in Daylesford with the hotel premises being a venue approved for gaming under the Gaming Regulation Act. Tattersalls was the authorised gaming operator of 18 gaming machines at that time. Subsequently, the electronic gaming machine regime in Victoria was amended with new GMEs able to be acquired through a bidding process by the venue operator for a license period of 10 years. The Trust was successful in acquiring 18 new GMEs at a total price of \$600,300 for a 10 year period. The purchase price was to be paid by instalments between May 2010 and August 2016.

The High Court, in its unanimous judgement, stated “There can be no question that the purchase price was incurred on capital account”. The High Court agreed with the dissenting judgement of Thawley J in the Full Federal Court, that the acquisition of the GMEs “...was not an expenditure which would need to be repeated over and over again as a necessity of trade...”.

The High Court reviewed many cases which have considered the question of whether expenditure is on capital account or revenue account. Again, the analysis shows that what may on the surface appear to be a simple distinction, is often blurred and difficult to draw.

The High Court noted:-

*“Authority is clear that the test of whether an outgoing is incurred on revenue account or capital account primarily depends on what the outgoing is calculated to effect from a practical and business point of view. Identification of the advantage sought to be obtained ordinarily involves consideration of the manner in which it is to be used and whether the means of acquisition is a once-and-for-all outgoing for the acquisition of something of enduring advantage or a periodical outlay to cover the use and enjoyment of something for periods commensurate with the payments. Once identified, the advantage is to be characterised by reference to the distinction between the acquisition of the means of production and the use of them; between establishing or extending a business organisation and carrying on the business; between the implements employed in work and the regular performance of the work in which they are employed; and between an enterprise itself and the sustained effort of those engaged in it. Thus, an indicator that an outgoing is incurred on capital account is that what is secured is necessary for the structure of the business.”*

Sharpcan in the alternative argued that the purchase price was incurred on revenue account because *“the acquisition of the GMEs did not amount to the acquisition of “permanent rights”*”.

The High Court rejected the submissions on behalf of Sharpcan, but did not discuss whether a lesser term or repeating term would qualify as expenditure on revenue account.

The case was an interesting discussion of the longstanding difficulty in determining whether an item is on capital account or revenue account.

**Date Published: 13 November 2019**

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