

BETWEEN:

BHP BILLITON LIMITED (ACN 004 028 077)
(NOW NAMED BHP GROUP LIMITED)

Appellant

And

COMMISSIONER OF TAXATION

Respondent

10

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

1. I certify that this outline is in a form suitable for publication on the internet.

Part II:

2. The words "*in accordance with*" in s 318(6)(b)¹ describe the causal connection that is required between the "*directions, instructions or wishes*" of an entity and the "*acts*" of a company or its directors which, for the purposes of s 318(2)(d) and (e), render the former a "*controlling entity*" and the latter a "*controlled company*": [AS20]; [AS35].
3. That causal connection is one of "effective control". To act "*in accordance with*" the "*directions, instructions or wishes*" of another entity, a company or its directors must treat those "*directions, instructions or wishes*" as themselves being a sufficient reason so to act. If a company or its directors freely decide to act having determined, after exercising independent judgment, that to do so is in the best interests of the company, or merely act in concert with another entity, the definition in s 318(6)(b) is not engaged: [AS22], [AS27] and [AS38].
4. The appellant advances three key reasons in support of this construction of s 318(6)(b).
5. First, it is consistent with the way in which similar words contained in the definition of "director" in s 9 of the *Corporations Act 2001* (Cth) (**JBA Vol 2 tab 7 pg. 226**) – which have a long provenance in company law – have been construed: [AS22]; [AS36-37];

¹ All legislative references are to provisions of the *Income Tax Assessment Act 1936* (Cth) ("1936 Act"), unless otherwise specified.

Davies J [31] [CAB84]; *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47, 51 [9] (JBA Vol 4 tab 35 pg. 1010). There is no reason why the words in s 318(6)(b) should be given a different meaning. Both the immediate and wider statutory context of s 318(6)(b) reveal that the definition is directed at identifying effective control over a company: [AS25]; [AS33].

6. Second, it is consistent with statements in extrinsic materials relating to both: (i) the purpose and operation of s 318 ([AS29]; Davies J [32] [CAB85]; e.g. JBA Vol 5 tab 46 pg. 1273-1274; tab 50 pg. 1300, 1308); and (ii) antecedent provisions in the 1936 Act, including former “associate” definitions, which employ(ed) similar language to s 318(6)(b): [AS30-32]; [Rep5-6]. Those materials refer to companies that are “effectively controlled”, or “effectively under the direction or control” of an entity (e.g. JBA Vol 5 tab 40 pg. 1217; tab 41 pg. 1224; tab 42 pg. 1237; tab 43 pg. 1244; tab 44 pg. 1252).

7. Third, it provides a clear and unambiguous causal test which can be workably applied both in the context of Part X and in the more than 160 provisions throughout the Tax Acts² which invoke the definition in s 318: [AS34]; [Rep4]. Although Thawley J (with whom Allsop CJ agreed) accepted that s 318(6)(b) described a “species of control or influence, or expected control or influence”, his Honour did not define what the requisite causal standard was – save for noting that it “[fell] short of legal control”: [81] [CAB99]; [AS36]. In this Court, as he did below, the respondent has declined to articulate any alternative construction of the words “in accordance with” in s 318(6)(b) that is consistent with his concession that they require a causative connection: [Rep3-4].

8. On the appellant’s construction of s 318(6)(b) and the facts found by the Tribunal (including those set out at [AS8]-[AS19]), it must follow that:

- (a) Ltd was not “sufficiently influenced” by Plc for the purposes of s 318(2)(d)(i)(A);
- (b) Plc was not “sufficiently influenced” by Ltd for the purposes of s 318(2)(e)(i)(A); and
- (c) BMAG was not “sufficiently influenced” by Plc and Ltd for the purposes of s 318(2)(d)(i)(B): [AS39].

9. There were no “directions, instructions or wishes” communicated by Ltd or Plc to the other (either directly or through interposed entities) “in accordance with” which the other was accustomed or obliged to act. Nor did the DLC Arrangement provide any basis for

² All capitalised terms have the meaning given in the Appellant’s submissions.

supposing that such “*directions, instructions or wishes*” would or might reasonably be expected to be communicated and, if they were communicated, that the recipient would act “*in accordance with*” them in the sense of treating them as a sufficient reason so to act.

10. The “*act*” of Ltd and Plc relied upon by Thawley J was each entity keeping its general meeting (or poll) open to enable its special voting shareholder to cast its vote: Thawley J [145]-[146] [CAB118]; [AS40]; [Rep12]. To the extent this constituted an “*act*” of either entity:

10 (a) there was no communication by the other company of a “*direction, instruction or wish*” that the first company keep its poll open. The notification upon which Thawley J relied contained information only: [AS41-42]; [AFM183]; and

(b) the “*act*” of keeping its poll open was undertaken by each of Ltd and Plc in order to comply with cl. 56(1) of its constitution (AFM36 and AFM108) and cl. 6.3 of the Sharing Agreement (AFM167), not because of the notification given by the other company: [AS44]; Davies J [41] [CAB88].

11. Similarly, the process by which dividends were declared and paid by Ltd and Plc did not involve any “*direction, instruction or wish*” from one entity to the other: see [RFM4-15]. Even if it did, such a “*direction, instruction or wish*” did not cause, and could not have caused, the other’s payment of a dividend: Tribunal Reasons [37] [CAB25-26]/[CAB55-56]; Davies J [42]-[43] [CAB88-89]; Thawley J [162] [CAB122]. The dividend arrangements are illustrative of mutual decision-making by Ltd and Plc, not “effective control” exercised by one entity over the other: [Rep10].

12. In light of the Tribunal’s findings of fact in relation to BMAG (see [AS16]-[AS19]), there is no basis upon which to conclude that BMAG was, within s 318(6)(b), accustomed or obliged, or might reasonably be expected, to act “*in accordance with*” the “*directions, instructions or wishes*” of its shareholders: [AS39]; [Rep13].

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30



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