IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B28 of 2019

BETWEEN:

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

Appellant

and

10

COMMISSIONER OF TAXATION

Respondent

20

APPELLANT'S REPLY

King & Wood Mallesons
Level 50, Bourke Place
600 Bourke Street
Melbourne VIC 3000
DX 101 Melbourne

Telephone: 03 9643 4261
Fax: 03 9643 5999
Email: michael.perez@au.kwm.com
Ref: Michael Perez
File: 03-5507-1573

Part I:

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

Part II:

2. The respondent misstates the issues. He does so by ignoring the limitation imposed by s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth).[1] The appeal to the Full Court, and this Court, is confined to the question of law on which the appeal is based.[2] The respondent urges the Court to ignore the factual findings made by the Tribunal[3] and advances a number of new factual propositions in their place. For example:

(a) at RS [18] and RS [65] he wrongly asserts that each of Ltd and Plc[4] could "properly choose", and "were entitled", to take an action "solely because it was in the interests of the shareholders in the other company". That proposition is both factually incorrect, having regard to the terms of the DLC Constituent Documents[5] and the Tribunal's findings of fact,[6] and contrary to law;[7]

(b) at RS [23] he asserts that "Ltd and Plc were able to control – both positively and, at least, by means of a veto – decisions made by the general meeting of the other" – despite the Tribunal expressly finding that, neither in law nor in fact, did Ltd or Plc control, formally or informally, the other during the Relevant Years;[8]

(c) at RS [32] he misdescribes the mechanism by which dividends of Ltd and Plc were "recommended" and paid.[9] The passage of Thawley J's reasons to which the respondent refers ([156]-[162] **[CAB121-122]**) does not support the assertions made in this paragraph; and

---

[1] E.g. Respondent's submissions ("RS") [5], [15], [16]; see *Brown v Repatriation Commission* (1985) 7 FCR 302, 304 and *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315, 348 [85].
[2] *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315, 349 [90].
[3] RS [34]. Appellant's submissions ("AS") [15] and [19] set out actual findings made by the Tribunal. Those findings were not legal conclusions/ *"conclusory labels"* for the Tribunal's application of s 318(6)(b) to the facts as found.
[4] These submissions adopt the defined terms from the appellant's submissions.
[5] In particular, clause 2(b) of the Sharing Agreement [**AFM160**]; Rule 104(2) of the Ltd Constitution [**AFM54**] and Rule 104(2)(a) of the Plc Articles [**AFM129**].
[6] Including Tribunal Reasons [4] (JSOF [21]) [**CAB13**]/[**CAB43**], [28] [**CAB22**]/[**CAB52**] and [34] [**CAB24**]/[**CAB54**].
[7] *Walker v Wimborne* (1976) 137 CLR 1, 6-7 (Mason J, with whom Barwick CJ agreed).
[8] Tribunal Reasons, [32] [**CAB24**]/[**CAB54**]; see also [28] [**CAB22**]/[**CAB52**]. The references to a "veto" and decisions being "made" by the general meeting in RS [23] also lack any proper factual basis (noting, for example, that resolutions were not "made" until the casting of votes by the Special Voting Shareholders: see AS [14(j)] and the DLC Constituent Documents referred to therein).
[9] As to which, see Tribunal Reasons [37] [**CAB25-6**]/[**CAB55-6**].

(d) at RS [33] he refers to Thawley J's reasons at [171] **[CAB125]** in support of the proposition that "BMAG might reasonably be expected to follow instructions issued jointly by Ltd and Plc". That conclusion does not fairly reflect the findings of fact made by the Tribunal at [51] and [52] **[CAB31]**/**[CAB61]**, or elsewhere as set out fully in AS [16]-[19].

3. The respondent conceded below that s 318(6)(b) requires a causal connection between a company's actions and the directions, instructions or wishes of the putative *"controlling entity"*,[10] but has refrained from engaging with the nature of that causal requirement.[11] Instead, he asserts that s 318(6)(b) involves an "evaluative standard"[12] and, as an "anti-avoidance" provision, "should be given a broad and substantive construction".[13] The respondent identifies *"influence"* as the subject of s 318(6)(b),[14] but does not explain how his reliance upon *"influence"* conforms with this Court's decision in *The Owners of the Ship Shin Kobe Maru v Empire Shipping Company Inc*;[15] nor, in any event, does he give any content to the word *"sufficiently"* with which the word *"influenced"* is conjoined.

4. By contrast, Ltd's construction of s 318(6)(b) provides, with respect, a clear and unambiguous test[16] which is grounded in principle. Ltd seeks to use the analogy with "shadow directors" as guidance, not as a "fortress".[17] The respondent fails to articulate any alternative construction of the words "*in accordance with*" that is consistent with his concession that they require a causative connection.[18]

5. Contrary to RS [52]-[56], Ltd's construction of s 318(6)(b) is supported by extrinsic materials. In his Economic Statement delivered on 12 April 1989[19] ("Economic

---

[10] Davies J [25] **[CAB81]**.
[11] Or, as Thawley J preferred, "how far short" of legal control the provision falls: [81] **[CAB99]**.
[12] RS [60].
[13] RS [42] and [48]. Cf *Commissioner of Taxation v Spotless Services Limited* (1996) 186 CLR 404, 414 where this Court pointed out that even the general anti-avoidance provision in Part IVA of the 1936 Act *"is to be construed and applied according to its terms"*.
[14] RS [36]; see also RS [40], [48], [49] and headings used throughout the respondent's submissions.
[15] (1994) 181 CLR 404, 419; AS [26] footnote 68.
[16] Cf RS [60]. Ltd does not read the word "control" into the text of s 318(6)(b): see AS [22]; cf RS [36].
[17] Cf RS [45]; see also AS [37].
[18] Though the example in RS [50] suggests that the respondent considers the definition in s 318(6)(b) will be enlivened by "mere coincidence" between the acts of a company or its directors and an entity's directions, instructions or wishes: cf Thawley J [87] **[CAB100-101]**.
[19] Part X of the 1936 Act was enacted to give effect to this document (as modified in subsequent press statements): *Commissioner of Taxation v Consolidated Press Holdings Ltd* (1999) 91 FCR 574, 577 [9] (French, Sackville and Sundberg JJ); Explanatory Memorandum, Taxation Laws Amendment (Foreign Income) Bill 1990 (Cth) 1.

Statement"), the Treasurer stated that the principal mischief to which s 318 was directed was the "fragmentation" of a foreign company's share ownership so as to avoid the control tests in Part X[20] (including the CFC test in s 340). The mischief is addressed in relation to companies in s 318(2). In Ltd's submission, comparisons with other limbs of s 318 which apply to other legal personalities, including natural persons (s 318(1)), do not assist in construing s 318(6)(b).[21]

6. The Economic Statement further acknowledged that "the meaning to be given to associated persons" in the new Part X (i.e. in s 318) would "follow the meaning" in existing provisions contained in the thin capitalisation and capital gains tax rules.[22] The
10 tests for "associated persons" in those rules were then contained in former s 159GZC and s 160E of the 1936 Act (addressed at AS [30]-[32]), respectively.

7. Significantly, ss 159GZC and 159GZE were the first provisions containing words similar to those in s 318(6)(b) to adopt the expression *"might reasonably be expected"*. The inclusion of these words did not alter the causal nexus required by the words *"in accordance with"*. They would enable a finding of the requisite form of control to be reached "where there is no past pattern of conduct but the circumstances are such that the company or the directors 'might reasonably be expected'" to act in accordance with the directions, instructions or wishes of a person or entity.[23] The words *"might reasonably be expected"* have the same effect in s 318(6)(b).[24]

20 8. The word "*wishes*" in s 318(6)(b) has a similar utility. It does not dilute the test in s 318(6)(b),[25] but encompasses communications from a putative *"controlling entity"* which may not be squarely or neatly classifiable as "*directions*" or "*instructions*".[26]

9. Further, in Ltd's submission, contrary to RS [39], the "majority voting interest" test in

---

[20] *Taxation of Foreign Source Income: an Information Paper*, forming part of the Economic Statement, April 1989, delivered on 12 April 1989 by the Honourable P. J. Keating M.P., Chapter 2, [2.11].
[21] Cf RS [43].
[22] *Taxation of Foreign Source Income: an Information Paper*, *supra*, [2.39]. The Economic Statement further stated that the meaning would be suitably modified to reflect the particular needs of the accruals taxation measures – in particular, to deal with partnerships having both resident and non-resident partners. Cf RS [54]-[56].
[23] Explanatory Memorandum, Taxation Laws Amendment Bill (No. 4) 1987 (Cth) 73 (s 159GZE).
[24] Cf RS [41].
[25] Cf RS [49]. Contrary to the respondent's contention at RS [4], the appellant does not contend that the word "wishes" is confined to things that would otherwise be a direction or instruction: AS [25(c)].
[26] In *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47, 70 [187], Young JA stated that *"virtually no significance has been given"* to the addition of the word "wishes" in the "shadow director" definition.

s 318(6)(c) does not entail a "greater [degree] of control" than s 318(6)(b) – it has a different sphere of operation. It is concerned with "orthodox" control of a company, being control exercised by the casting of votes at a company's general meeting.[27] By contrast, the test in s 318(6)(b) is concerned with "de facto" control of a company, being control over a company's business or daily "acts".[28] The respondent[29] conflates the two tests: he suggests that the latter is a broader, watered down version of the former. With respect, that cannot be right – if it were, each of ss 318(6)(c), 318(2)(d)(ii) and 318(2)(e)(ii) would be otiose.[30]

10. As to RS [64], Thawley J rejected the respondent's submission that the payment of dividends by Ltd was done *"in accordance with"* the wishes of Plc.[31] Thawley J instead relied on the fact that Ltd might reasonably be expected to recommend to the Risk and Audit Committee that it declare the same dividend as Plc in accordance with Ltd and Plc's wishes as "support[ing]" a "conclusion that Ltd and Plc sufficiently influenced each other".[32] His Honour did not explain how, in these circumstances, either company was *"sufficiently influenced"* by the other on his Honour's construction of s 318(6)(b) – as opposed to engaged in mutual decision-making.

11. The Tribunal was also, with respect, correct to find as it did in relation to voting at Ltd's and Plc's general meetings.[33] In referring to a "vote by Ltd and Plc on a Class Rights Action or Joint Electorate Action"[34] and the "implied" expression of wishes,[35] the respondent invites this Court to: a) ignore the fundamental delineation at law between a company and its shareholders;[36] b) disregard the terms of the DLC Constituent Documents; and c) instead arrive at a conclusion based on the perceived substance and effect of the voting arrangements. Such an approach is impermissible, absent a statutory directive permitting it[37] (and there is no such directive here).

---

[27] See AS [25(b)] and the cases cited in AS footnote 65.
[28] As to which, see *Commissioner of Taxation v Commonwealth Aluminium Corporation Ltd* (1980) 143 CLR 646, 659-660 (Stephen, Mason and Wilson JJ).
[29] RS [39] and [61] (the latter is concerned with the casting of votes at general meetings of Ltd and Plc).
[30] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71].
[31] Thawley J [162] **[CAB122]**.
[32] Thawley J [162]-[163] **[CAB122-123]**.
[33] Tribunal Reasons [38]-[40] **[CAB26]**/**[CAB56]**.
[34] RS [61]. This is factually incorrect and, in Ltd's submission, a mischaracterization of Thawley J's reasons.
[35] RS [62].
[36] *John Shaw and Sons (Salford) Limited v Shaw* [1935] 2 KB 113, 134; see also *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[37] *Federal Coke Co Pty Ltd v Federal Commissioner of Taxation* (1977) 34 FLR 375, 387 (Bowen CJ); see also *Commissioner of Taxation v Orica Ltd* (1998) 194 CLR 500, 531 [70] (Gaudron, McHugh, Kirby and Hayne JJ).

12. In asking whether it might reasonably be expected that a *"controlled company"* will act in accordance with the directions, instructions or wishes of a putative *"controlling entity"*, s 318(6)(b) is asking a general question, which is to be answered by reference to the evidence; in particular, evidence of the "acts" of the *"controlled company"*. As addressed in AS [40]-[44], the only "act" of Ltd and Plc identified by the majority in the Full Court (and the respondent) as reasonably being expected to be in accordance with the directions, instructions or wishes of the other[38] was Ltd and Plc keeping their respective general meetings open. That proposition is not correct: to not keep their general meetings open in accordance with their respective constitutions would be to

10 deny one of their shareholders its right to vote. Even if it[39] were correct, in Ltd's respectful submission, it is not enough to enliven the definition in s 318(6)(b), in itself nor "supported" by Thawley J's finding at [163] **[CAB123]** as to dividends (even if that finding were correct). When one considers the overall operations of Ltd and Plc, on the facts as found by the Tribunal, the general proposition in s 318(6)(b) is not established.

13. With respect to BMAG, Ltd respectfully submits that the Tribunal's reasons disclose no error and the conclusion it reached necessarily follows from the proper construction of s 318(6)(b) having regard to the facts it found.[40]

14. Finally, this Court will not, it is respectfully submitted, be influenced by the respondent's references to "anti-avoidance".[41] BMAG was a subsidiary of Plc when the

20 DLC Arrangement was formed and Ltd has, at all material times following the formation of the DLC Arrangement, returned its share of BMAG's income from dealings with Ltd subsidiaries pursuant to the CFC provisions. The question in this case is whether the formation of the DLC Arrangement provides the respondent with the opportunity to also include BMAG's income from dealings with Plc subsidiaries in the assessable income of Ltd.

Dated: 21 August 2019

DAVID BLOOM QC
Telephone: (03) 9225 7774
Email: d.h.bloom@vicbar.com.au

---

[38] As opposed to their joint wishes: cf. Thawley J [162] **[CAB122]**.
[39] And the finding made by Thawley J at [155] **[CAB120]**.
[40] As to which, see AS [16]-[19]; see also AS [39]; cf RS [33] addressed in paragraph 2(d), above.
[41] RS [42], [48].