BHP BILLITON LIMITED (NOW NAMED BHP GROUP LIMITED) v COMMISSIONER OF TAXATION (B28/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 4

Date of judgment: 29 January 2019

Special leave granted: 15 May 2019

This appeal concerns the assessment of the Appellant, a company listed on the Australian Securities Exchange, for tax by the Respondent ("the Commissioner") for the income years ended 30 June 2006 to 30 June 2010. At all material times, the Appellant was in a dual listed company arrangement ("the DLC Arrangement") with BHP Billiton Plc ("Plc"), a company listed on the London Stock Exchange. Both companies had the same directors and senior managers, and the two operated as if they were a single economic entity. The Appellant and Plc indirectly owned, in the respective proportions 58% and 42%, the Swiss company BHP Billiton Marketing AG ("BMAG").

The Appellant and Plc had a special voting arrangement, whereby votes cast by the ordinary shareholders of the Appellant and, separately, of Plc on an identical resolution came to be counted mutually. This was effected in each case by a shareholding company which was obliged, in casting its votes, to mirror the voting pattern and numbers of the ordinary shareholders of the other company (i.e. of the Appellant or Plc). In that way, for example, a resolution that would otherwise pass in respect of the Appellant on the voting of its ordinary shareholders could be defeated as a result of contrary votes cast by the special voting shareholder company, such votes merely mirroring the voting pattern and numbers of Plc's ordinary shareholders on an identical resolution.

Under Part X of the *Income Tax Assessment Act 1936* (Cth) ("the Act"), BMAG was deemed a "controlled foreign company" whose income was subject to attribution as income of the Appellant's for Australian tax purposes. In the relevant income years, BMAG made profits on the sale of commodities it had purchased from Australian subsidiaries of the Appellant. The Appellant included 58% of such profits in its Australian taxable income as "tainted sales income" under Part X of the Act. In amended assessments for tax, the Commissioner additionally included in the Appellant's income, as tainted sales income, 58% of profits BMAG had made on the sale of commodities it had purchased from Australian subsidiaries of Plc ("the Plc Purchase Profits").

In attributing the Plc Purchase Profits to the Appellant as tainted sales income, the Commissioner characterised the relevant Australian subsidiaries of Plc as "associates" of BMAG within the meaning of s 318(2) of the Act. This was on the view that the Appellant was "sufficiently influenced" by Plc, or vice versa, or that BMAG was sufficiently influenced by both the Appellant and Plc. Section 318(6)(b) of the Act provides that a company is sufficiently influenced by an entity if the company or its directors might reasonably be expected to act in accordance with the directions, instructions or wishes of that entity.

An objection by the Appellant to the amended assessments was disallowed by the Commissioner, whereupon the Appellant sought a review by the Administrative Appeals Tribunal ("the Tribunal"). On 22 December 2017 the Tribunal (Justice Logan, Deputy President) set aside the Commissioner's objection decision, after finding that BMAG was not accustomed to treating the wishes or directions of Plc or the Appellant, without more, as a sufficient reason to act. The Tribunal found that the board of BMAG followed the wishes or directions of Plc or the Appellant only if to do so was in BMAG's best interests. The Tribunal also found that neither company could dictate to the other in the event of a disagreement and that the DLC Arrangement did not abrogate the effective control of Plc and the Appellant by their respective shareholders and directors.

An appeal by the Commissioner was allowed by the Full Court of the Federal Court (Allsop CJ and Thawley J; Davies J dissenting). Allsop CJ and Thawley J held that the Appellant and Plc sufficiently influenced each other, on account of two factors: (1) the special voting arrangement, and (2) an obligation of the Appellant and Plc to pay matching dividends. Their Honours held that the Tribunal had erred by focusing on the powers of directors and on the lack of a relationship of control and subservience. The majority also held that BMAG was sufficiently influenced by the Appellant and Plc, its owners, since it was likely to follow the wishes or directions of its owners despite undertaking an assessment of its own best interests in deciding whether to do so.

Justice Davies however found that the special voting arrangement and the payment of matching dividends were merely incidents of the DLC Arrangement, in the making of which the Appellant and Plc had each pursued its own interests. To act in concert with a mutuality of interest was not to act in accordance with the direction, instruction or wishes of the other within the meaning of s 318(6)(b) of the Act. Her Honour also held that the Tribunal was correct to hold that BMAG was not sufficiently influenced by the Appellant and Plc, given that BMAG exercised independent judgment and acted in accordance with its own best interests.

The grounds of appeal include:

- The Full Court erred in concluding that, despite holding that the words invoke a causal test, a person or entity acts "in accordance with" the directions, instructions or wishes of another entity for the purposes of s 318(6)(b) of the Act if the person or entity merely acts "in harmonious correspondence, agreement or conformity with" those directions, instructions or wishes.

- The Full Court should have found that, in order to act "in accordance with" the directions, instructions or wishes of another entity for the purposes of s 318(6)(b), a person or entity must treat that other entity's directions, instructions or wishes as themselves being a sufficient reason so to act.