

BYWATER INVESTMENTS LIMITED & ORS v COMMISSIONER OF TAXATION (S134/2016);
HUA WANG BANK BERHAD v COMMISSIONER OF TAXATION (S135/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 176

Date of judgment: 11 December 2015

Special leave granted: 5 May 2016

Bywater Investments Ltd (“BI”), Chemical Trustee Ltd (“CT”) and Derrin Brothers Properties Ltd (“DBP”) are companies that were each incorporated abroad (BI in the Bahamas, CT and DBP in the United Kingdom). Their ultimate parent companies are two Cayman Islands companies, one of which is JA Investments Ltd (“JAI”). The sole shareholder of both Cayman Islands companies is Mr Peter Borgas, who resides in Switzerland. Mr Borgas has also been a director of BI, CT and DBP since 1998.

Hua Wang Bank Berhad (“HWB”) is a company incorporated in Samoa. A bearer debenture issued by HWB that suspends the voting rights of the company’s shareholders is held by JAI.

BI, CT, DBP and HWB (together, “the appellants”) have made large profits from trading in shares of companies listed on the Australian Stock Exchange. The respondent (“the Commissioner”) considered that the appellants were all controlled by Mr Vanda Gould, a Sydney-based accountant. The Commissioner therefore deemed the appellants to be “residents of Australia” within the meaning of s 6(1) of the *Income Tax Assessment Act 1936* (Cth) (“the Act”), on the basis that their central management and control was in Sydney. The Commissioner then assessed each of them for income tax for various years from 2001 to 2007. The combined total of those tax assessments was more than \$13 million. After the Commissioner disallowed objections by the appellants to their respective assessments, the appellants all appealed to the Federal Court.

On 12 January 2015 Justice Perram largely dismissed the appellants’ appeals. His Honour rejected the contentions of the appellants that they were effectively controlled by Mr Borgas in countries other than Australia. Justice Perram found that Mr Borgas and the appellants’ other directors did not, as the appellants had claimed, merely obtain advice from Mr Gould. Rather, they carried out Mr Gould’s wishes in a mechanical fashion and it was therefore Mr Gould who truly controlled each company. His Honour accordingly concluded that Sydney was the place of central management and control and that the Commissioner could therefore treat the appellants as Australian residents for tax purposes.

The appellants all appealed. The Full Court of the Federal Court (Robertson, Pagone & Davies JJ) unanimously dismissed both appeals. Their Honours held that Justice Perram had not erred in concluding that each of the appellants had

failed to discharge its burden of proof to establish that it was not a resident of Australia for tax purposes.

In appeal S134/2016, the grounds of appeal include:

- The Full Court erred in failing to overturn the Primary Judge's finding that each of the appellants failed to discharge their burden of proof to establish that each was not a resident of Australia for tax purposes.
- On the findings of fact made by the Primary Judge, the Full Court should have held that the appellants' central management and control was in Switzerland or the United Kingdom, that each of the appellants was not a resident of Australia and should have set aside the Primary Judge's conclusion to the contrary.

In appeal S135/2016, the ground of appeal is:

- The Full Court erred by concluding that the Primary Judge identified and applied the correct principles for determining corporate tax residency. In particular:
 - i) on the findings of fact made by the Primary Judge, the Full Court erred by concluding that the appellant's central management and control was located in Australia, and that the appellant was a resident of Australia;
 - ii) the Full Court endorsed the view of the Primary Judge that the 'real business' of a company is located with the person who is the controlling mind of the company. This is not correct. The correct principle is that the 'real business' of a company is located at the place where the organs of the company exercise legally effective authority; and
 - iii) the Full Court adopted an erroneous view of *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973) 129 CLR 177.

In each appeal the Commissioner has filed a notice of contention, the grounds in which include:

- The Court below was bound to follow the decision of *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973) 129 CLR 177.

In appeal S135/2016 the Commissioner has also filed a summons, seeking either that the grant of special leave to appeal be revoked or that judgment be given for the Commissioner, on the basis that even if Hua Wang were to succeed on its sole ground of appeal its liability for tax would not change.