



HIGH COURT OF AUSTRALIA

Public Information Officer

17 November 2005

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v
SUN ALLIANCE INVESTMENTS PTY LIMITED (in liquidation)

The High Court of Australia today upheld a tax assessment that reduced by more than \$17 million capital losses claimed by Sun Alliance and consequently increased its taxable income.

Sun Alliance objected to an amended income tax assessment for the income year ending 31 December 1997. The losses it wished to claim had been incurred by Royal and Sun Alliance Insurance Australia Holdings (RSA) and had been transferred to its wholly owned subsidiary, Sun Alliance. The Royal Insurance group of companies underwent a restructure in 1992, with the British parent company selling its entire shareholding in Royal Australia Holdings Limited to RSA (then known as Sun Alliance Australian Limited) for \$125 million plus 40 per cent of RSA shares. The Royal and Sun Alliance Group was thus formed via a merger on 8 October 1992 between the Royal Group and the Sun Alliance Group, with RSA as its Australian holding company.

Phoenix Securities Pty Ltd and Sun Alliance Australia Ltd (SAIL) were wholly owned subsidiaries of RSA. SAIL's assets included land and buildings in Bridge Street, Sydney, valued at \$57,050,000 at the merger date. The assets of Phoenix included shares in publicly listed companies. The proceedings relate to capital losses claimed by RSA upon its disposal of shares in both Phoenix and SAIL. At issue was whether RSA had incurred the losses that were transferred. In dispute was the meaning of "profits that were derived by the company" in section 160ZK(5) of the *Income Tax Assessment Act*. In particular, the question was whether and in what circumstances a profit can be said to have been derived at a time before the acquisition of shares by the taxpayer if at the acquisition date a gain to the company, specifically increases in the value of assets, remained unrealised.

The Tax Commissioner disallowed Sun Alliance's objection to the amended assessment and Sun Alliance appealed to the Federal Court. Justice Margaret Stone upheld the disallowance. The Full Court held that increases in the value of Phoenix's share portfolio as at the merger date did not have a sufficiently permanent character to be regarded as profit. However, it held that no error was made by the Commissioner or by Justice Stone in describing as profits derived by SAIL before the merger date an amount related to an increase in the value of SAIL's real estate. The Commissioner appealed to the High Court against the first finding and Sun Alliance cross-appealed against the second part of the decision.

The Court unanimously allowed the appeal by the Commissioner and dismissed the cross-appeal. It held that profit did not have an inherently permanent character and could be constituted by unrealised gains. Increases in value of Phoenix shares before the merger date, which may be understood as profits already derived by Phoenix, were a partial cause of dividends paid to RSA after 30 October 1992. Dividends paid by SAIL to RSA in 1996 may also be seen as partly attributable to the unrealised increase in the value of the Bridge Street properties at the merger date.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*