



HIGH COURT OF AUSTRALIA

11 March 2020

BHP BILLITON LIMITED (NOW NAMED BHP GROUP LIMITED) v COMMISSIONER OF
TAXATION
[2020] HCA 5

Today the High Court dismissed an appeal from a decision of the Full Court of the Federal Court of Australia. The High Court unanimously held that, under the *Income Tax Assessment Act 1936* (Cth) ("the Act"), income derived by BHP Billiton Marketing AG ("BMAG") from the sale of commodities purchased by BMAG from BHP Billiton Plc's ("Plc") Australian entities was to be included in the assessable income of BHP Billiton Ltd ("Ltd"), because Plc's Australian entities were "associates" of BMAG.

Part X of the Act applies to an Australian resident taxpayer who has a sufficiently substantial interest in a controlled foreign company ("CFC"). The Part "attributes" a share of the CFC's income to the Australian resident taxpayer. One circumstance where income is attributable is where it is from the sale of goods by a company, if the goods were sold to the company by another entity and that entity (the seller) was an "associate" of the company and a Pt X Australian resident. A company is an "associate" of another entity where, among other situations, the company is sufficiently influenced by the other entity. Section 318(6)(b) of the Act relevantly provides that: "a company is sufficiently influenced by an entity or entities if the company, or its directors, are accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities".

The appellant, Ltd, an Australian resident taxpayer, is part of a dual-listed company arrangement with Plc. Under this arrangement, Ltd and Plc are required to operate "as if they were a single unified economic entity" through common boards of directors and "a unified senior executive management". BMAG is a Swiss company which was a CFC of Ltd. BMAG purchased commodities from Ltd's Australian subsidiaries and Plc's Australian entities for sale. The question was whether BMAG's income from the sale of commodities it purchased from Plc's Australian entities was to be included in the assessable income of Ltd under Pt X of the Act. That depended on whether Plc's Australian entities were "associates" of BMAG.

The Commissioner of Taxation submitted that Plc's Australian entities were "associates" of BMAG for three independently sufficient reasons: Ltd was "sufficiently influenced" by Plc; Plc was "sufficiently influenced" by Ltd; and BMAG was "sufficiently influenced" by Plc and Ltd. Ltd submitted that the entities were not "associates" of BMAG because for a company to be "sufficiently influenced" by another requires "effective control" by the other entity.

The High Court unanimously held that Plc's Australian entities were "associates" of BMAG, and that "effective control" was not required to establish that a company was "sufficiently influenced" by an entity. The High Court found that Ltd and Plc "sufficiently influenced" each other because they were required to operate as "combined businesses" and a "single unified economic entity". Further, Ltd and Plc's shareholding in BMAG, the dual-listing structure, and group level documents that were issued by Ltd and Plc which applied to BMAG compelled the conclusion that Ltd and Plc "sufficiently influenced" BMAG.

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.