**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY** **NO S 135 OF 2016**

On Appeal From
the Full Court of the Federal Court of Australia

**BETWEEN:** **HUA WANG BANK BERHAD**
Appellant

**AND:** **COMMISSIONER OF TAXATION**
Respondent

# SUBMISSIONS OF THE RESPONDENT


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## PART I PUBLICATION

1. The following submission is in a form suitable for publication on the internet.

## PART II ISSUES ON THE APPEAL

### (a) The Respondent's summons

#### *(i) The appeal against disallowance of the objection cannot succeed*

2. No issue arises on the grounds of appeal nor within the grant of special leave to appeal, whose resolution could lead to an order that the objection decision of the Respondent be set aside or to a reduction in the liability of the Appellant to tax.

3. Whether or not the Appellant was a resident of Australia during the years of income in contest, the profits on which the Appellant was assessed are included in its assessable income, as they have an Australian source: s 6-5 of the *Income Tax Assessment Act 1997* (Cth) (**the 1997 Act**).

4. The only question raised by the notice of appeal, and the only question within the grant of special leave to appeal, is whether the Federal Court erred in finding "on the findings of facts made by the primary Judge ... that the Appellant's place of central management and control was located in Australia and that the Appellant was a resident of Australia". Whether the Appellant can demonstrate such error in the reasoning of the primary Judge, and of the Full Court, that their conclusions as to residence should be overruled, can make no difference in the Appellant's liability to tax. No matter between the parties can be resolved by a decision on the sole ground of appeal.

#### *(ii) The orders sought*

5. No order is sought setting aside the order of the primary Judge that the application to the Federal Court be dismissed. All that is sought are orders that the findings of the courts below that the profits were ordinary income of the Appellant be set aside, notwithstanding that this Court refused special leave to appeal from those findings.[1] Such orders are not available within the

[1] The Amended Application for Special Leave to Appeal filed on 9 February 2016 proposed in Ground 3 an appeal against this part of the Full Court's decision, and sought in proposed Order 5 that, if such ground were successful, there should be a remittal of the capital / revenue question to the Full Court. The grant of special leave on 5 May 2016 was limited to Ground 2 (the residency question). Of necessity, that limited grant means that this Court did not permit the appeal to include proposed Order 5 (remittal of the capital / revenue question to the Full Court).

grant of special leave to appeal, and in any event would not be made without demonstration of error in the findings.

6. The Appellant's submission[2] that the Full Court "did not determine HWBB's appeal on the capital/income distinction" is wrong. The Court dismissed the appeal, thereby determining the whole of it; there was no separate appeal on "the capital-income distinction" which could have been or has been kept alive. The Appellant's submission is grounded on a selective quotation from the Court's reasons at [18]. The primary Judge found that the shares sold were held as trading stock, and neither the Respondent *nor the Appellant* challenged that finding. The Full Court held, for that reason,[3] that it would be inappropriate to revisit the question whether the profit (on sale of what was accepted to be trading stock) was on revenue account.

7. In short, the Full Court did not "leave open" the capital/revenue question; it rejected the Appellant's ground of appeal[4] in the appeal before it.

8. In any event it is submitted that the Court should not entertain (directly or via some remitter) a submission that the unanimous findings of the primary Judge and the Full Court as to the character of the gains should be set aside in circumstances where there is no appeal against the findings, no argument advanced as to that character, no particularisation of error in the findings and no opportunity afforded to the Respondent to dispute the presence of error in the judgments of the Federal Court.

9. There is no live issue between the parties as to the liability of the Appellant to tax. In the Respondent's submission, special leave should be revoked, or the appeal summarily dismissed. The balance of these submissions is wholly in the alternative.

## (b) The Appellant's argument: residence of the Appellant

10. The issues as to residence of the Appellant are:

    10.1. whether the "central management and control"[5] of a company is in Australia in circumstances where all deliberative decisions in the affairs of the company are made in Australia and the officers of the company,

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2 Appellant's submissions (**AS**) at [97]-[98].

3 The Appellant's submissions do not address the Full Court's reasoning concerning the parties' positions on the issue of trading stock.

4 Further Amended Notice of Appeal dated 22 October 2015 at paragraphs [7]-[10] and [14]-[22].

5 As that term is used in the definition of "resident" in s 6 of the *Income Tax Assessment Act 1936*.

outside Australia, do acts that "amount to no more than rubber stamping [those] decisions"[6];

10.2. whether on the facts as found by the primary Judge the "central management and control" of the Appellant was in Australia.

## PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

11. The Respondent certifies that he considers that no notice is required to be given under s 78B of the Judiciary Act.

## PART IV MATERIAL FACTS

12. Leave to appeal was granted, and the appeal is brought (Ground 2(i)), in respect of an error said to arise "on the findings of fact made by the Primary Judge". The account of those findings in Part V of the Appellant's submissions is a paraphrase of his Honour's findings, not always neutrally expressed[7] (so that it should not be relied upon without reference to the judgment text), and not entirely complete nor entirely relevant.[8]

13. The Respondent draws attention to the following findings of the primary Judge:

13.1. As to management and control: "the Bank's management decisions ... came from Mr Gould";[9] Mr Gould "had a ... need for someone to provide the illusion that he was not running the Bank. This someone was the

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6 "Rubber-stamping" is the Appellant's appreciation of the factual findings against it, which it does not challenge: AS at [35].

7 For example: as to [11] in AS, the Appellant is a "bank" only to the extent that it is given that appellation by a Samoan statute; it has none of the attributes of a trading or investment bank as that term is commonly used in Australian law, cf Primary Judgment at [46], [52]. The last two sentences in AS at [12] are special pleading, not facts found or led in evidence below. AS at [16] (to like effect in AS at [34(d)]) asserts that the Appellants were "alleged by the Respondent to be *managed by their directors* ... in accordance with the wishes" of Mr Gould; the Respondent argued that Mr Gould managed them and that the directors did not participate in management. As to [18] in AS, the primary Judge did not find that the directors were giving false evidence, but did not make any finding that they were "truthful". The Judge at [364(3)] did not make the statements attributed to him in AS at [18(v)] and [18(vii)], but a different and more limited finding, and did not make the findings alleged in the first sentence in AS at [18(viii)]. AS at [18(vi)] is an inaccurate account of evidence, not a finding of the Judge. His Honour did not make a finding as alleged in the first sentence in AS at [20] of fraud on the part of the directors of the Appellant.

8 The argumentative material in AS at [19]-[22] is not a statement of fact and is not wholly accurate: for example, AS at [21] misreports the judgment; Mr Gould was found to be the repository of central management and control not because of his ownership, but "quite apart from it". His Honour said at [350] and [352] "the Bank's predominant business was receiving money from Mr Gould or his clients and then returning it to related entities ... Quite apart from his ownership of it, I draw the conclusion that it was Mr Gould, and Mr Gould alone, who controlled the Bank's every move for three further reasons".

9 Primary Judgment at [53].

Asiaciti group";[10] "Mr Gould was the invariable source of [the] instructions" to Asiaciti;[11] "it was Mr Gould, and Mr Gould alone, who controlled the Bank's every move";[12] "every transaction carried out by the Bank was done on the instructions of Mr Gould";[13] "the directors of the Bank have at all times acted on [Mr Gould's] instructions";[14] "the directors simply implemented Mr Gould's will," were not "exercising judgment in their capacity as directors"[15] and "simply did what Mr Gould told them to do";[16] the "individuals in Samoa who transacted the Bank's official business did so on Mr Gould's instructions".[17]

13.2. As to the involvement of the directors: "the directors of the taxpayers exercised no independent judgment in the discharge of their offices but instead merely carried into effect Mr Gould's wishes in a mechanical fashion";[18] the directors "transacted the decisions of the Bank in Apia ... on every occasion at the direction of Mr Gould;"[19] the directors did not "[know] anything of the affairs of the Bank", were "entirely ignorant ... of what the interests of the Bank were"[20] and "had no idea what the business of the Bank was";[21] there was "no evidence of any transaction ever being refused by the employees [on the grounds of conflict of interest or unlawful conduct]. That was not their job";[22] the "directors were never placed in a position where they had to exercise the slightest judgment";[23] the directors "knew nothing at all about its business".[24]

14. The primary Judge, at [418]-[419], summarised his factual findings as follows:

> "The business of the bank appears to have been one of "borrowing" money from various clients and lending it back to related persons or entities in a way which appears designed to conceal their original nature, or at least the original owner. From the Bank's perspective, it was the business of matching loans with deposits. There was never any occasion for the directors to exercise any judgment about these transactions and the evidence is that they did not. They

10 Primary Judgment at [346].
11 Primary Judgment at [348].
12 Primary Judgment at [352].
13 Primary Judgment at [354].
14 Primary Judgment at [364].
15 Primary Judgment at [417].
16 Primary Judgment at [418].
17 Primary Judgment at [415].
18 Primary Judgment at [60].
19 Primary Judgment at [356].
20 Primary Judgment at [358].
21 Primary Judgment at [364].
22 Primary Judgment at [358].
23 Primary Judgment at [364].
24 Primary Judgment at [416].

simply did what Mr Gould told them to do. ... it was Mr Gould who was giving the instructions ... its real business was conducted by Mr Gould from Sydney".[25]

## PART V RELEVANT LEGISLATION

15. Appended is a copy of statutory provisions additional to those appended to the Appellant's submissions.

## PART VI ARGUMENT FOR THE RESPONDENT

### (a) Respondent's submissions in summary

16. Whether or not the Appellant was a resident of Australia in the relevant years, the profits in contest, being ordinary income with an Australian source, were assessable.

17. As to residence:

17.1. Central management and control requires an informed and deliberate making of the relevant business decisions. Mere adoption, without informed deliberation, of a proposal or direction of another is not exercise of central management and control. Reasoning to the contrary (if any) in earlier decisions should not be adopted in this Court.

17.2. There is no requirement that the person(s) exercising central management and control should hold a formal office in the company.

17.3. On the unchallenged factual findings of the primary Judge, set out at [13] and [14] above, his Honour's conclusion that the Appellant's "real business was conducted by Mr Gould from Sydney" and that its central management and control, and its residence, was located in Australia, is irresistible.

### (b) Statutory context

18. Section 6-5 of the 1997 Act provides that whether "you" are resident of Australia (subs (2)) or a foreign resident[26] (subs (3)), ordinary income derived from sources in Australia is included in "your" assessable income.

19. Section 6(1) of the *Income Tax Assessment Act 1936* (Cth) (**the 1936 Act**) defines "resident of Australia" to mean, in the case of a company, "a company

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25 Primary Judgment at [418], [419].

26 By s 995-1 of the 1997 Act, "foreign resident" means not a resident of Australia for the purposes of the 1936 Act.

which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia".

### (c) Residence of a company for income tax purposes

20. As to the law governing the determination of the residence of a company, and its application to the facts of a particular case, the Respondent relies upon, without repeating, what is submitted in sections (b) to (g) of Part VI of his submissions (**the Respondent's *Bywater* submissions**) in Appeal S134 of 2016 (so far as applicable to the present appeal),[27] together with the following submissions in respect of the Appellant's arguments on appeal.

### (d) The Appellant's arguments on appeal

21. Consistently with the limited grant of special leave to appeal, the Appellant's arguments are wholly directed to the question of its residence for the purposes of the Assessment Acts. The submissions which follow respond to those arguments, notwithstanding the operation of s 6-5.

22. The Appellant's submissions, after some introductory material, are directed to four claimed errors in the reasoning of the courts below (AS at [37]) and advance two versions of an argument as to the "correct" criteria for residence, as well as a "policy" argument based on presumed legislative intent. Because the Appellant's paraphrase of the judgments below is not wholly accurate,[28] some of its submissions seek to demonstrate error in findings and reasoning not made or adopted.

#### *(i) The Appellant's "overview" (AS at [23]-[36])*

23. The Appellant cites *Cesena Sulphur Co Ltd v Nicholson*[29] as authority for its argument that central management is to be found in "a purely formal presence [that] involved nothing of substance" (AS at [25]), but that decision supports the opposite conclusion. The Calcutta Jute Mills Company was "entirely under the actual control of ... the directors in England" and the business abroad was conducted by a local director as "merely the appointee and agent of the

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27 No question of double tax treaty protection, or of the scope of "effective management," arises in this appeal.

28 By way of example, the courts below did not make the statements or adopt the reasoning attributed to them in the last sentence of [34(a)], in [34(c)], [34(d)], footnote 28, [37(b)], [37(c)], [52], [56], [59] and [73] of the Appellant's submissions; in each case the submissions interpret, with greater or lesser degrees of inaccuracy, the court's reasons, and address the Appellant's interpretation rather than the reasons.

29 (1876) 1 Ex D 428.

directors in England".[30] The "real and substantial business"[31] of the Cesena Sulphur Company was carried on in England; "the directors exercise their powers in England, and no ... act of any kind can be done except under the authority and management of the directors in England".[32] In both cases the directors actually exercised control of the company; they were not a "purely formal presence" and did not "rubber stamp" decisions made by someone else.

24. That the legislature has not amended the Act in response to review committee reports is of no assistance in construing the unamended words of the Act (AS at [31]).

***(ii) The "organic", "legal authority" argument (AS at [37(a)], [39]-[45], [66]-[68])***

25. The relevant part of the definition asks only whether the "company ... *has* its central management and control in Australia". The statutory test is concerned with what actually happens in respect of the central management and control of the company, not with what ought to happen, nor with whether exercise of central management and control is by "legal authority". The Assessment Acts are concerned with whether income is derived in circumstances which make it assessable, and with whether deductions are incurred in gaining it, not with whether the actions which give rise to the income or deductions are "legally authorised".[33] In the context of residence, that the criterion is what does happen rather than what should happen was recognised by the House of Lords in *Unit Construction Co Ltd v Bullock*[34] and by Gibbs J in *Esquire Nominees Ltd v The Commissioner of Taxation of the Commonwealth*: "a company is resident where its real business is carried on, and its real business is carried on where the central management and control *actually* abides,"[35] not where it ought to abide.

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30 1 Ex D 428, 444 (per Kelly CB) (the Calcutta Jute Mills Company was the first of two companies dealt with in the judgment); cf at 445, 446-7, "acts of the highest importance, ... are done in India, is perfectly true; but they are all done by mere agents—whether they be directors or not—appointed under the sole authority of the governing body in this country. ... every act done, ... is done by them indirectly, because it is done by the person appointed by them, whom they may recall at their pleasure, and who has no authority ... except the authority conferred upon him by the governing body at home".

31 1 Ex D 428, 454 (Huddleston B).

32 1 Ex D 428, 450 (Kelly CB).

33 Unlawfully gained income is assessable, *Partridge v Mallandaine* (1886) 18 QBD 276, 278 (Denman and Hawkins JJ); *Commissioner of Internal Revenue v Tellier* 383 US 687, 691 (1966); *Buckman v Minister of National Revenue* (1991) 91 DTC 1249; *Macfarlane v Federal Commissioner of Taxation* (1986) 13 FCR 356, 380-1 (Burchett J). Expenses unlawfully incurred to gain unlawful income are in character deductible, *FC of T v La Rosa* (2003) 129 FCR 494 (Hely J, Carr and Merkel JJ agreeing), but statute now denies the deduction, s 26-54 of the 1997 Act.

34 [1960] AC 351, at 363 (Viscount Simonds); at 370 (Lord Radcliffe).

35 (1972-3) 129 CLR 177, 189.

26. Nor is the statute concerned with whether the central management and control resides in an "authority organic to the company," in the sense that the person exercising it is "part of the juristic entity" comprising the company. The statutory question is whether the company's central management and control is in Australia: that is a factual question, not a juristic one, which involves identifying what management and control is exercised, and where. Whether the person who exercises it is formally an officer of the company is not a question asked by the definition.

10 27. The idea that a company can be managed by a person who is not part of the "juristic entity" is not novel; it was accepted soon after the enactment of the first of the modern registered company statutes. In *Gibson v Barton*[36] it was held that a provision of the Companies Act 1862 imposing a penalty on a delinquent director or manager applied to someone who had acted as such although not validly appointed, for such a person could not be heard to deny that he was "de facto manager". In *In re Canadian Land Reclaiming and Colonising Co (Coventry and Dixon's case)*[37] the defendants acted as directors without holding the requisite qualifying shares, and it was held that
20 having acted as if they were directors they were liable as such. While deeming provisions of Corporations legislation which extend the definition of "director" for its purposes do not have effect for the purposes of the Assessment Acts, the concept of a de facto director examined and developed in high appellate consideration of that legislation[38] is applicable to the question whether a person has participated in the central management and control of a company arising under the Assessment Acts. That a person is not the duly appointed holder of an office within the corporate structure does not preclude that person from being in fact the repository and locus of its central
30 management and control.

***(iii) Esquire Nominees: "an air of unreality" (AS at [37(b)], [37(c)], [46]-[55])***

28. As might be expected, most of the cases in which the location of residence for tax purposes has arisen have concerned companies carrying on ordinary trading activities under the real supervision of their directors and managers, and the issue has been the location from which the directors have acted, or the significance of the role of an employed manager. Controversies such as
40 the present have arisen only as a result of endeavours to manage the residence of companies for fiscal purpose, as part of an orchestrated sequence of events designed to secure a particular advantage.

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36 (1875) LR 10 QB 329.

37 (1880) 14 ChD 660. The directors succeeded on a procedural point concerning s 165 of the 1862 Act but both the Master of the Rolls and the Court of Appeal described them as de facto directors liable as directors for misconduct by which the company suffered loss.

50 38 In this Court, *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 (Gibbs, Mason, Jacobs, Murphy and Aickin JJ); in the Full Federal Court, *Grimaldi v Chameleon Mining NL and Another (No 2)* (2012) 200 FCR 296, 314-326 (Finn, Stone and Perram JJ); in the English Supreme Court, *Revenue and Customs Commissioners v Holland* [2010] 1 WLR 2793.

29. Where in such cases a tribunal or court has found as a fact that the directors exercised independent judgment after due consideration, notwithstanding the pre-planned nature of the transactions and the close supervision of an outside party, the companies have been held to be resident where the directors meet: *Esquire Nominees* and *Wood v Holden.*[39] Where the directors have been found to act in a merely ministerial capacity, it has been the person or organisation making the deliberative decisions as to what documents should be executed and what resolutions passed who has been found to exercise central management and control: *Unit Construction Co Ltd v Bullock*,[40] *Fundy Settlement v Canada*,[41] and *HMRC v Smallwood.*[42]

30. The Appellant advances in AS at [46]-[50] a remarkably revisionist view of the decision in *Esquire Nominees*: that despite the findings of Gibbs J that the directors made their own decision, "because they accepted that it was in the interest of the beneficiaries" to do as they did,[43] the case should be considered an instance of the "directors mechanically adopting" the directions of the accountants, and taken as authority for the proposition that such mechanical adoption is an exercise of central management and control. A similar construction of *Wood v Holden* is advanced at AS in [51]-[55].[44] These contentions rest on a misstatement of the reasons of the courts. Justice Gibbs rejected the Solicitor-General's argument[45] that the directors simply passed resolutions without consideration. The Court of Appeal in *Wood v Holden*[46] proceeded on the basis of a factual finding, not open to review, that it was the directors who made the relevant decisions, and did not make the statement attributed to it in AS at [53]. In particular, neither "regularly appointed" nor "mechanical" – key expressions in the Appellant's argument – appear in the judgments in either Court.[47] Neither case is authority for the propositions advanced in AS at [54].

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39 [2006] 1 WLR 1393, where the finding of fact was that of the Special Commissioners and was not reviewable on its merits by the Court.

40 [1960] AC 351; the formal acts of the subsidiaries, and the day to day management of their business, were conducted by the African resident chairman of directors of the subsidiaries, according to the directions of the London Board, [1959] Ch 315, 320, 321-2.

41 [2012] 1 SCR 520 at 526-7 [14]-[16].

42 [2010] EWCA Civ 778 at [48] (Hughes and Ward LJJ) (Patten LJ dissenting).

43 (1972) 129 CLR 177, 191.4.

44 AS at [52] inaccurately reformulates the reasons of the Full Court in the last sentence of [9] of its judgment.

45 129 CLR at 190, the Commissioner "submitted that the directors of the appellant merely carried out directions given to them by" the accountants, recording the submission (transcript of proceedings, 19 October 1971, p 354) that "most of these things were done as a result of pre-planned resolutions, ... where Mr. McIntyre and his co-directors simply had to meet and say: 'Oh, well, this is what is going to happen here, we pass that resolution.' There was no need, one would think, for any lengthy period of time, and, in the circumstances, no need for lengthy consideration".

46 [2006] 1 WLR 1393 at 1470 [40].

47 Nor do they appear in the judgment of the Full Court.

31. The Respondent submits that where the directors of a company do no more than formally implement a transaction or sequence of transactions the substance and form of which have been conceived and prescribed by a party in a jurisdiction different from that in which the directors meet, and there is no examination of the consequences, advantages or disadvantages of the transaction, no consideration of alternatives and no dissent nor any real prospect of dissent from the course of events presented to them for adoption, the "real business" of the company is found not in the formal acts of the directors but in the acts and at the location of those who formulate and structure the transactions and issue to the directors the instructions which they are to carry out; and it is the latter, not the directors, who exercise the central management and control of the company.

32. On the factual findings of the primary Judge, set out above, the present case does not rise even to the level of mechanical decision making by adoption of instructions; the directors "were never placed in a position where they had to exercise the slightest judgment," were "entirely ignorant" of the Appellant's interests, and "simply implemented Mr Gould's will". Their conduct met the description approved in *Wood v Holden*:[48] they did not "apply their minds to whether or not to sign the documents". They did not comprise a locus of any management or control, central or otherwise.

***(iv) "Irrelevant matters" (AS at [37(d)], [56]-[64])***

33. Two material putatively "irrelevant" matters are advanced in the Appellant's submissions[49] as having been taken into account by the courts below in their decisions: whether Mr Gould was the "controlling mind" of the Appellant, and whether its activities included acts which were "fraudulent".

34. The use of the expression "controlling mind" exhibits a recurring characteristic of the Appellant's submissions. The phrase is repeatedly ascribed to the courts below: at [34(a)], [34(b)], [39], [56] and [57], and indirectly at [7-8], [83], [87], [90] and [92]. The reasons of the courts below are impugned both (at [40], [44]) as "contrary to authority,"[50] and (at [56]-[58]) as taking into account the irrelevant consideration that "Gould was the controlling mind". But the expression "controlling mind" does not appear in the judgments below; only in the Appellant's submissions. The challenge to the reasons is illusory.

35. In any event, whether Mr Gould managed and controlled the acts of the Appellant was entirely relevant to the location of its central management and control.

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48 [2006] 1 WLR 1393 at 1415 [36].

49 Not entirely accurately: AS at [56] asserts a statement not made by the Full Court at [10], while AS at [59] asserts a characterization ("fraudulent") which does not appear in the primary Judge's reasons.

50 viz, *North Australian Pastoral Co Ltd v Federal Commissioner of Taxation* (1946) 71 CLR 623.

36. So far as the second matter refers to findings of deceit and dishonesty, the findings complained of were relevant at an evidentiary level, in distinguishing the appearance put forward by the Appellant from the reality of the conduct concerning it. No case was made by the Respondent, and no finding was made, of fraud on the part of the Appellant or Mr Gould, and no regard was had by the primary Judge to fraud in his reasoning on the subject of residence[51].

37. Ultimate ownership of the Appellant (referred to in AS at [57]-[58]) was also relevant at an evidentiary level, because the Appellant from the outset presented a case that it was indirectly, through JA Investments Ltd, owned by Mr Borgas, and that Mr Gould was no more than an advisor.[52] That contention, as the primary Judge explained,[53] went to the case that Mr Gould was not the locus of the central management and control of the Appellant. The Full Court accurately described the Appellant's case as "depending on the veracity of Mr Borgas' evidence," since Mr Gould was not called.

***(v) "Primary and alternative submissions" (AS [65-81])***

38. The Respondent's engagement with the submissions advanced as "primary" and "alternative"[54] is principally to be found in [25]-[27] above and in the Respondent's *Bywater* submissions.

39. The Appellant's argument in this section of its submissions takes as an accepted premise that it is always the "regularly appointed directors or other organ of governance" that exercises central management and control (save in the "exceptional" case where the board does not function at all). The argument seeks to reduce to a simplistic (and easily manipulated) "rule" a matter which the courts have repeatedly said is a question of fact, or of what "actually" happened in each case. The Appellant's repeated assertion that *Unit Construction Co Ltd v Bullock* is an "exception" to be confined to its facts should be rejected. What the decision illustrates is the broader proposition that "residence is determined by the solid facts" of the actual locus of central management and control in each case.

40. In the context of this appeal, the Appellant's assumed premise begs the question: the contest is as to whether it was Mr Gould, or the "regularly appointed" directors, who exercised central management and control, and the primary Judge found as a fact that the directors exercised no judgment in their

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51 Primary Judgment at [415].

52 See for example Primary Judgment at [10], [85], and the Appellant's Appeal Statement at [24]; Full Court at [14].

53 Primary Judgment at [68], [77]; Full Court at [16]-[17].

54 The Appellant's "alternative" submission is not so much a different contention as one that even if (contrary to its submission) further or "additional" conditions must be met for inactive directors to comprise central management and control, those conditions are met by the Appellant.

capacity as directors, made no decisions, and simply did as they were told by Mr Gould. It was he who managed and controlled the Appellant.

41. The Respondent disputes that the three "criteria" proposed in AS at [71] are sufficient to establish central management and control, but submits that in any event the Appellant failed to meet them.

41.1. As to the first, whether the directors would decline to do anything illegal or improper, the Appellant's submission in AS at [73] omits from the findings of the primary Judge the italicised words: "*Whilst* they would not have knowingly transacted any illegal business *they had no idea what the business of the Bank was and this was, therefore, an empty reservation*". The attempt in at AS at [74]-[75] to justify the omission, by postulating "rules" that are found neither in the authorities nor in his Honour's judgment, does not address his Honour's conclusion: that the directors did not know enough to make reasoned decisions amounting to an exercise of central management and control.

41.2. As to the second, the relevant question is not whether the documents were "read" but whether the decisions they record were understood and considered and constituted real exercises of judgment; his Honour's findings[55] were that the directors did not exercise any judgment and simply did as they were told.

41.3. As to the third, whether or not the directors are accurately described as having been "dictated to," the fact as found is that they simply did what they were told, without any independent consideration.

***(vi) "Policy issues" (AS at [84]-[96])***

42. The argument that the Appellant's preferred construction of the definition of "residence" (and its application to the present facts) is supported by a "policy choice made by the legislature" is groundless. Subsequent use of the same phrase in other contexts says nothing as it its meaning. Enactment of a new regime which specially taxes resident holders of "associate-inclusive control interests" in a foreign company on a share of its "attributable income" can give no guidance as to the meaning of a phrase of general application first enacted 60 years earlier. At most the new regime indicates an intent to broaden the Australian tax base.[56]

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55 Neither the leave granted nor the grounds of appeal extend to contesting, sidestepping or extending the factual findings of the primary Judge, and the selective account of the evidence in AS at [77] would have to be examined (as the primary Judge did) in the context of the cross-examination before any such conclusion as is propounded by the Appellant could be accepted. His Honour did not accept those conclusions.

56 See *Carr v WA* (2007) 232 CLR 138, 143 [6] (Gleeson CJ).

43. The supposed simplicity and precision of the Appellant's version of the criteria in *Esquire Nominees* rests on a circularity, see [39] above, unless it is reduced to a simplistic enquiry into observance of the formalities of appointments of directors. The "vexation" forecast at AS at [91] is visited only on those who seek to manipulate corporate residence. Residence is ultimately a question of fact; that differences of opinion can arise on questions of fact, and require curial resolution, is no reason to avoid an appropriate factual criterion.

44. That some practitioners and commentators may have advised and written on the basis of a particular belief[57] as to the effect of the decision in *Esquire Nominees* is no reason for this Court to sanction that belief when it is mistaken.

## PART VII NOTICE OF CONTENTION

45. The Respondent submits that none of the authorities (nor in particular the decision in *Esquire Nominees*) support the arguments advanced by the Appellant; rather they support the argument of the Respondent that on the findings of fact of the primary Judge (not challenged in the Appellants' notice of appeal) each of the Appellants was a company resident in Australia at all material times.

46. If contrary to the Respondent's submission the Court finds that *Esquire Nominees* is authority for the Appellant's proposition that central management is to be found in "a purely formal presence [that] involved nothing of substance", the Respondent submits that for the reasons above, (applying the criteria set out in *John v Federal Commissioner of Taxation*),[58] that decision should not now be followed.

47. *First,* while the line of authority to the effect that a company is resident where its central management and control is found can be traced back to 1876, *Esquire Nominees* was the first case to consider directors acting under close supervision. *Second*, the issue of residence was dealt with obiter by Gibbs J and was not argued in the Full Court in *Esquire Nominees*. *Third*, for the reasons at [42]-[44] of the Respondent's *Bywater* submissions, if the decision has the effect contended for by the Appellants, it is a potential source of mischief. *Fourth*, the decision has not been followed in respect of residence in this country, nor by any superior appellate court in any other country.

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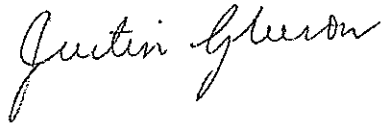
57 AS at [82].

58 (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) citing *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58 (Gibbs CJ, with whom Stephen J and Aickin J agreed). See also *Alqudsi v The Queen* [2016] HCA 24 at [66] (French CJ).

## PART VIII ORAL ADDRESS

48. The Respondent estimates the time required to present its oral argument in both this appeal and the concurrent appeal in S134 of 2016 to be three hours.

Dated: 30 June 2016



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# Income Tax Assessment Act 1997

**Act No. 38 of 1997 as amended**

This compilation was prepared on 6 July 2007
taking into account amendments up to Act No. 117 of 2007

**Volume 1** includes: Table of Contents
Sections 1-1 to 36-55

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

**Volume 2** includes: Table of Contents
Sections 40-1 to 55-10

**Volume 3** includes: Table of Contents
Sections 58-1 to 122-205

**Volume 4** includes: Table of Contents
Sections 124-1 to 152-430

**Volume 5** includes: Table of Contents
Sections 164-1 to 220-800

**Volume 6** includes: Table of Contents
Sections 240-1 to 410-5

**Volume 7** includes: Table of Contents
Sections 700-1 to 727-910

**Volume 8** includes: Table of Contents
Sections 768-100 to 995-1

(2) Some ordinary income, and some statutory income, is exempt income.

(3) Exempt income is not assessable income.

(4) Some ordinary income, and some statutory income, is neither assessable income nor exempt income.

For the effect of the GST in working out assessable income, see Division 17.

(5) An amount of ordinary income or statutory income can have only one status (that is, assessable income, exempt income or non-assessable non-exempt income) in the hands of a particular entity.

## Operative provisions

### 6-5 Income according to ordinary concepts (*ordinary income*)

(1) Your ***assessable income*** includes income according to ordinary concepts, which is called ***ordinary income***.

Note: Some of the provisions about assessable income listed in section 10-5 may affect the treatment of ordinary income.

(2) If you are an Australian resident, your assessable income includes the *ordinary income you *derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

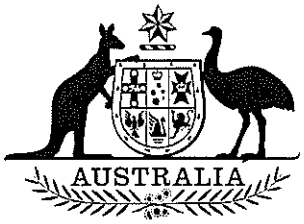
(3) If you are a foreign resident, your assessable income includes:

(a) the *ordinary income you *derived directly or indirectly from all *Australian sources during the income year; and

(b) other *ordinary income that a provision includes in your assessable income for the income year on some basis other than having an *Australian source.

(4) In working out whether you have ***derived*** an amount of *ordinary income, and (if so) when you ***derived*** it, you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf or as you direct.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.




# Income Tax Assessment Act 1936

**Act No. 27 of 1936 as amended**

This compilation was prepared on 5 July 2007
taking into account amendments up to Act No. 113 of 2007

| | |
|---|---|
| **Volume 1** includes: | Table of Contents<br>Sections 1 – 78A |

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

| | |
|---|---|
| **Volume 2** includes: | Table of Contents<br>Sections 79A – 121L |
| **Volume 3** includes: | Table of Contents<br>Sections 124K – 202G |
| **Volume 4** includes: | Table of Contents<br>Sections 204 – 624 |
| **Volume 5** includes: | Table of Contents<br>Schedules 2, 2C – 2H, 2J and 3 – 5 |
| **Volume 6** includes: | Note 1<br>Table of Acts<br>Act Notes<br>Table of Amendments<br>Repeal Table<br>Notes 2 – 7<br>Tables A and B |

# An Act to consolidate and amend the law relating to the imposition assessment and collection of a tax upon incomes

## Part I—Preliminary

### 1 Short title [*see* Note 1]

This Act may be cited as the *Income Tax Assessment Act 1936.*

### 6 Interpretation

(1AA) So far as a provision of the *Income Tax Assessment Act 1936* gives an expression a particular meaning, the provision does *not* also have effect for the purposes of the *Income Tax Assessment Act 1997* (the ***1997 Act***), or for the purposes of Schedule 1 to the *Taxation Administration Act 1953*, except as provided in the 1997 Act or in that Schedule.

(1) In this Act, unless the contrary intention appears:

***100% subsidiary*** has the same meaning as in the *Income Tax Assessment Act 1997.*

***accrued leave transfer payment*** has the meaning given by section 6G.

***AFOF*** means an Australian venture capital fund of funds within the meaning of subsection 118-410(3) of the *Income Tax Assessment Act 1997.*

***agent*** includes:

(a) every person who in Australia, for or on behalf of any person out of Australia holds or has the control, receipt or disposal of any money belonging to that person; and

(b) every person declared by the Commissioner to be an agent or the sole agent of any person for any of the purposes of this Act.

***allowable deduction*** means a deduction allowable under this Act.

***reportable fringe benefits total*** for a year of income for a person who is an employee (within the meaning of the *Fringe Benefits Tax Assessment Act 1986*) means the employee's reportable fringe benefits total (as defined in that Act) for the year of income.

***resident*** or ***resident of Australia*** means:

(a) a person, other than a company, who resides in Australia and includes a person:

(i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;

(ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia; or

(iii) who is:

(A) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; or

(B) an eligible employee for the purposes of the *Superannuation Act 1976*; or

(C) the spouse, or a child under 16, of a person covered by sub-subparagraph (A) or (B); and

(b) a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia.

***resident trust for CGT purposes*** has the same meaning as in the *Income Tax Assessment Act 1997*.

***return*** on a debt interest or equity interest has the same meaning as in the *Income Tax Assessment Act 1997*.

***return of income*** means a return of income, or of profits or gains of a capital nature, or of both income and such profits or gains.

***royalty*** or ***royalties*** includes any amount paid or credited, however described or computed, and whether the payment or credit is