



HIGH COURT OF AUSTRALIA

4 August 2021

DEPUTY COMMISSIONER OF TAXATION v ZU NENG SHI [2021] HCA 22

Today, the High Court allowed an appeal from a decision of the Full Court of the Federal Court of Australia ("the Full Court") dismissing an appeal from a decision of the Federal Court refusing to make an order under s 128A(6) of the *Evidence Act 1995* (Cth) that a privilege affidavit be filed and served on the Deputy Commissioner of Taxation ("the Commissioner").

The Commissioner obtained orders in the Federal Court freezing the worldwide assets of the respondent ("Mr Shi"). Ancillary orders required Mr Shi to disclose matters relating to the assets ("the disclosure order"). Section 128A(2) provides that if a person subject to a disclosure order objects to complying with it on the grounds of the privilege against self-incrimination, the person must prepare an affidavit containing the information to which the objection is taken ("privilege affidavit"). If the court is satisfied that there are reasonable grounds for the objection, s 128A(5) provides that the court must not require the information in the privilege affidavit to be disclosed, subject to an exception in s 128A(6). Under s 128A(6) the court may order that the privilege affidavit, in whole or in part, be disclosed if satisfied that, (a) any information in it may tend to prove that the person has committed an offence against or arising under an Australian law; and (b) the information does not tend to prove that the person has committed an offence against or arising under, a law of a foreign country; and (c) the interests of justice require the information to be disclosed. Mr Shi objected to complying with part of the disclosure order on the grounds of self-incrimination. The primary judge was satisfied that there were reasonable grounds for the objection and was also satisfied of the matters in s 128A(6)(a) and (b) but held that because there were other means by which the Commissioner could obtain the information in the privilege affidavit, the interests of justice did not require it to be disclosed. On appeal, the Full Court, by majority, upheld the primary judge's holding that the interests of justice did not require disclosure, taking into account other available ways that the information could be obtained.

The High Court, by majority, allowed the appeal. The Court held that the Full Court and the primary judge took an irrelevant consideration into account in failing to be satisfied that the interests of justice required disclosure of the information in the privilege affidavit. The inquiry mandated by s 128A(6)(c) proceeds on the premise that, as part of or in connection with an extant freezing or search order in a civil proceeding, there is an extant disclosure order operating to require provision of the information. No part of the inquiry is to question whether information required to be provided in compliance with that extant disclosure order would more appropriately be obtained through some other compulsory process.

- *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.*