

## **MILLS v COMMISSIONER OF TAXATION (S225/2012)**

Court appealed from: Full Court of the Federal Court of Australia  
[2011] FCAFC 158

Date of judgment: 8 December 2011

Special leave granted: 17 August 2012

Mr Andrew Mills (“the Taxpayer”) held certain securities (“the Securities”) that had been issued by the Commonwealth Bank of Australia (“the Bank”). The Securities comprised an unsecured subordinated note issued through the Bank’s New Zealand branch and a non-redeemable preference share which could not be traded separately. The Bank paid fully franked dividends on all of its shares, and it proposed to make a franked distribution on the Securities. Such a distribution would normally enable the Taxpayer to claim a corresponding tax offset (by the use of imputation credits) under s 207-20 of the *Income Tax Assessment Act 1997* (Cth) (“the 1997 Act”). The Commissioner of Taxation (“the Commissioner”) however determined, under s 177EA(5)(b) of the *Income Tax Assessment Act 1936* (Cth) (“the 1936 Act”), that the Taxpayer could obtain no imputation benefit. This was on the basis that the arrangement was a scheme entered into for a purpose (other than an incidental purpose) of enabling the Taxpayer to obtain an imputation benefit, as described in s 177EA(3)(e) of the 1936 Act (“the relevant purpose”). Mr Mills objected to the Commissioner’s decision. On 12 January 2010 the Commissioner disallowed that objection. Mr Mills then appealed to the Federal Court.

On 11 March 2011 Justice Emmett dismissed Mr Mills’ appeal. His Honour held that, of the factors set out in s 177EA(17) of the 1936 Act, more of them pointed towards the relevant purpose than away from it. Justice Emmett found that factors in the Commissioner’s favour included the Bank’s obligation to compensate the Taxpayer for any unavailability of imputation credits and the payments’ similarity to interest. They also included the sourcing of distribution payments from income (of the Bank’s New Zealand branch) which bore no Australian tax.

On 8 December 2011 the Full Court of the Federal Court (Dowsett & Jessup JJ; Edmonds J dissenting) dismissed Mr Mills’ appeal. The majority held that the central elements of the scheme indicated that the Bank did have the relevant purpose. Their Honours found as decisive the facts that amounts for distribution were calculated by reference to the level of imputation benefits, and that the Bank was to deliver (or to compensate for any lack of) imputation benefits. Justice Edmonds however found that the circumstances weighed in favour of the Bank. His Honour found that the Bank was required to fully frank its distributions on the Securities because it did so for all dividends that it paid. Justice Edmonds further found that the provision of imputation benefits was no more than an incidental purpose of the distributions to be paid on the Securities.

The grounds of appeal include:

- The Full Court erred in holding that the Bank entered into or carried out a scheme for the Securities for a purpose, not being an incidental purpose, of enabling the relevant taxpayer to obtain an imputation benefit within the meaning of s 177EA(3)(e) of the 1936 Act.

On 23 August 2012 the Respondent filed a notice of contention, the ground of which is:

- The Full Court below should have found that the following provisions of the 1936 Act also supported the conclusion that the Bank entered into or carried out the scheme for a purpose (not being an incidental purpose) of enabling the Appellant to obtain an imputation benefit within the meaning of s 177EA(3)(e) of the 1936 Act: s 177EA(17)(ga) and (h); s 177D(b)(vi).
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