



HIGH COURT OF AUSTRALIA

14 November 2012

ANDREW VINCENT MILLS v COMMISSIONER OF TAXATION

[2012] HCA 51

Today the High Court allowed an appeal against a decision of the Full Court of the Federal Court of Australia and set aside a determination of the Commissioner of Taxation ("the Commissioner") that no franking credit is to arise in respect of distributions made on certain securities issued by the Commonwealth Bank of Australia ("the Bank").

On 14 October 2009 the Bank issued ten million "Perpetual Exchangeable Resaleable Listed Securities V" ("PERLS V"), each comprising a preference share stapled to an unsecured promissory note issued out of the Bank's New Zealand branch, and with an aggregate issue price of \$2 billion. The Bank issued PERLS V to meet projected capital requirements cost-effectively and consistently with applicable prudential standards requiring a certain proportion of "Tier 1" capital. Holders of PERLS V were entitled to quarterly distributions, which were expected to be fully franked and paid by the Bank's New Zealand branch out of funds earned by the New Zealand branch.

The Commissioner and the Bank agreed to test in a court the application of s 177EA of the *Income Tax Assessment Act 1936* (Cth) ("the ITAA 1936") to the arrangements for the franking of distributions on PERLS V and for the Bank, if unsuccessful, to make a cash payment to the Commissioner settling the obligations of PERLS V holders. On 14 December 2009 the Commissioner made a determination under s 177EA(5)(b) of the ITAA 1936 in relation to Mr Andrew Mills, a holder of PERLS V and an Australian resident, that no imputation benefit was to arise in respect of the first franked distribution that the Bank was to make on PERLS V. The Commissioner disallowed an objection to that determination and Mr Mills commenced a proceeding in the Federal Court of Australia under Pt IVC of the *Taxation Administration Act 1953* (Cth). The primary judge, and a majority of the Full Court of the Federal Court, found for the Commissioner, holding that having regard to the "relevant circumstances" of the arrangements for the issue of PERLS V, it would, within the meaning of s 177EA(3)(e) of the ITAA 1936, be concluded from the perspective of a reasonable person that the Bank entered into and carried out those arrangements "for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling" a holder of PERLS V to obtain an imputation benefit.

The High Court held unanimously that the relevant circumstances to be taken into account included that distributions on the securities were to be paid by the New Zealand branch of the Bank without payment of Australian income tax by the Bank on the source of funding and that without the issue of PERLS V the Bank would have raised Tier 1 capital by other means at higher cost. The High Court held that although it would be concluded that the Bank had a purpose of enabling PERLS V holders to obtain an imputation benefit, that purpose was

incidental to its purpose of raising Tier 1 capital. As the purpose was an incidental purpose, a necessary precondition to the Commissioner's power to make the determination was not satisfied.

- *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.*