



HIGH COURT OF AUSTRALIA

16 November 2016

BYWATER INVESTMENTS LIMITED & ORS v COMMISSIONER OF TAXATION;
HUA WANG BANK BERHAD v COMMISSIONER OF TAXATION
[2016] HCA 45

Today the High Court unanimously dismissed appeals by four companies ("the appellants") from a decision of the Full Court of the Federal Court of Australia. The High Court held that the appellants were Australian residents for income tax purposes during the relevant years and were thus liable to tax in Australia.

All but one of the directors of three appellants – Bywater Investments Ltd, Chemical Trustee Ltd and Derrin Brothers Properties Ltd – were resident in Switzerland. When meetings of directors were held, they took place in Switzerland. Hua Wang Bank Berhad, the other appellant, was incorporated in Samoa and most of its directors were employees of a Samoan international trustee and corporate service provider. In August 2010, the Commissioner of Taxation issued assessments to the appellants in respect of profits derived from the purchase and sale of shares listed on the ASX. The appellants objected to the assessments on the basis, inter alia, that they were not Australian residents under s 6(1) of the *Income Tax Assessment Act 1936* (Cth) ("the Act"). Their objections were substantially disallowed by the Commissioner and the appellants appealed to the Federal Court of Australia.

The primary judge found that, notwithstanding the overseas location of the formal organs of each company, the real business of the appellants was conducted by an Australian resident, Mr Gould, from Sydney, without the involvement of the directors of the appellants. The primary judge held that the "central management and control" of each appellant therefore was situated in Australia in the terms of s 6(1) of the Act, rendering each appellant liable to tax as an Australian resident. On appeal, the Full Court of the Federal Court rejected the appellants' argument that their central management and control was situated abroad because the meetings of their boards of directors were held abroad. The Full Court found no reason to doubt the primary judge's findings of fact, and no error in the conclusion that each appellant was a resident of Australia for income tax purposes.

By grant of special leave, the appellants appealed to the High Court. The Court held that, as a matter of long-established principle, the residence of a company is a question of fact and degree to be answered according to where the central management and control of the company actually abides, and that is to be determined by reference to the course of the company's business and trading, rather than by reference to the documents establishing its formal structure. The Court held that the fact that the boards of directors were located abroad was insufficient to locate the residence of the appellants abroad in circumstances where, on the findings of the primary judge, the boards of directors had abrogated their decision-making in favour of Mr Gould and only met to mechanically implement or rubber-stamp decisions made by him in Australia. The Court held that the appellants could not escape liability for income tax in Australia on the basis that they were resident abroad. Nor could Bywater Investments, Chemical Trustee or Derrin Brothers Properties rely on applicable double taxation agreements on the basis that their "place of effective management" was other than in Australia. The High Court unanimously dismissed the appeals.

- *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.*