



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
 SYDNEY REGISTRY

BETWEEN:

COMMISSIONER OF TAXATION

Appellant

and

PEPSICO, INC / STOKELY-VAN CAMP, INC

Respondents

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

**Part I: Certification.**

These submissions are in a form suitable for publication on the internet.

**Part II: Propositions to be advanced in oral argument**

**Appeal Ground 1: Part of the payments were consideration for intellectual property**

1. **Correct approach.** Whether the payments by SAPL included an amount “as consideration for” the use of intellectual property is to be discerned from the whole of the agreement recording the transaction and whether the use of intellectual property was part of what moved or actuated the payments: AS [16]-[27]; FC [156]-[158], [168]-[193] (Colvin J).
- 20 2. **Role of construction.** The proper construction of the agreement is a necessary first step but is not determinative of whether an amount was paid “as consideration for” the use of intellectual property: AS [27]; AR [5]; FC [25]-[26] (Perram and Jackman JJ), [173]-[174] (Colvin J); cf RS [35].
3. **“Central transaction” test.** The majority’s “central transaction” test is contrary to the language in the statutory definition of “royalty” and previous decisions of this Court addressing such language: AS [23]-[26]; cf FC [29]-[35] (Perram and Jackman JJ). Had the majority adopted the correct approach, they would have concluded that the payments included a royalty: AS [30]; FC [36] (Perram and Jackman JJ).
- 30 4. **The EBAs.** When regard is had to the whole of the EBAs, the rights granted to SAPL to use PepsiCo/SVC’s intellectual property to manufacture, distribute and sell the famous PepsiCo Group branded beverages in Australia was part of what moved or actuated the payments: AS [28]-[29]; FC [194]-[198] (Colvin J); PepsiCo EBA,

c11 3(a), 4(a), 5(a), 6, 11(a), 20, 24(a)(i), 24(e)(i), 27(a) (AFM pp 7-21); SVC EBA, c11 3(a), 4.1, 5.3, 6.3, 7.1, 18.2, 18.5(b)(ii) (AFM pp 27-70).

5. **Royalty not ‘offset’ by mutual benefits or restrictions.** There is no evidence or finding that the benefit to SAPL in being able to use PepsiCo/SVC’s intellectual property was ‘offset’ either by the benefit to PepsiCo/SVC in having goodwill in their trade marks maintained through such use or by the restrictions placed upon the use of that intellectual property under the terms of the EBAs: AR [8]; cf RS [30]-[32], FC [17]-[21] (Perram and Jackman JJ).

**Appeal Ground 2: The payments were ‘paid to’ and ‘derived by’ PepsiCo/SVC**

- 10 6. **Income was derived as the payments were applied or dealt with as PepsiCo/SVC directed.** SAPL’s obligation under the EBAs was to pay PepsiCo/SVC or as PepsiCo/SVC directed and PepsiCo/SVC were entitled to the payments under the EBAs. The payments are income “paid” to and “derived by” PepsiCo/SVC because they were “dealt with” on behalf of PepsiCo/SVC or as PepsiCo/SVC “direct[ed]”: AS [31]-[39]; AR [10]-[14]; PepsiCo EBA, c11 4(a), 4(c), 22(b), 24(a), 26(a); SVC EBA, c11 7.1, 7.4(f), 7.4(g).

**Appeal Ground 3: The respondent is liable to diverted profits tax (DPT)**

7. **Correct approach to “tax benefit”.** If PepsiCo/SVC are not liable to withholding tax on part of the SAPL payments, they are liable to DPT. Absent the **scheme** involving the *actual* EBAs, PepsiCo/SVC might reasonably be expected to have been liable to pay royalty withholding tax on part of those payments (**tax benefit**), under the **Commissioner’s postulates**, whereby the EBAs instead (i) expressed the payments to be for all the property provided by and promises made by PepsiCo/SVC; or (ii) expressly provided for the payments to include a royalty: ss 177C(1)(bc), 177CB(3)-(4); AS [40]-[45]; PJ [18(c)(i)], [434]-[443]; cf FC [68]-[101] (Perram and Jackman JJ).
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8. **Reasonable alternative.** The Commissioner’s postulates are a reasonable alternative to the scheme, on the facts as found: PJ [169]-[170], [177]-[182], [209]-[211], [217], [434]-[441]. The respondents’ submissions conflict with those findings (AS [61]-[64]; AR [17]-[22]; cf RS [53]-[59]) and were not dealt with by any member of the Full Court (FC [99] (Perram and Jackman JJ), [214]-[217] (Colvin J)).
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- A postulate need not provide an additional commercial benefit: AR [16]; cf RS [53].

9. **Misidentification of “substance” of the scheme.** The allocation by the EBAs of the SAPL payments solely to concentrate was not the “substance” of the scheme: cf FC [76]-[82] (Perram and Jackman JJ). Its “substance” was that SAPL received the tangible and intangible property required to manufacture, bottle and sell branded beverages and paid an amount of money to the Pepsi group. The Commissioner’s postulates have the same substance. They only differ from the scheme in their *form*: AS [46]-[54]; AR [23]; PJ [436]-[437]; cf RS [45], [51], FC [86] (Perram and Jackman JJ).
10. **‘Substance’ incorrectly treated as dispositive of the s 177CB enquiry.** Having found that s 177CB(4)(ii) supported the reasonableness of the Commissioner’s postulates (FC [88]-[93]), but s 177CB(4)(i) did not, the majority below should not have rejected those postulates without further considering the evidence as to reasonableness: AS [55]-[56]; cf FC [93]-[99].
11. **Failure to consider expert evidence.** The expert evidence did *not* all proceed from an assumption that the concentrate price in the actual EBAs included a royalty: AS [57]-[59]; cf FC [50], [53], [70], [77], [80]-[82] (Perram and Jackman JJ). The primary judge accepted the evidence of a brand licensing expert that it was reasonable to expect a royalty to be paid for the use of the licensed intellectual property, given the strength of the Pepsi group brands: PJ [248], [440], [464], [466]. Further, the majority inverted the onus: AS [60].
12. **How the onus on “tax benefit” is discharged.** For PepsiCo/SVC to discharge their onus on ‘tax benefit’, they needed but failed to demonstrate a postulate that was a reasonable alternative to the scheme and which did not include a royalty subject to withholding tax. The Full Court was wrong to conclude that the onus could be discharged by demonstrating that “there is no reasonable postulate”: AS [65]-[74], AR [24]-[25]; cf FC [68], [100]-[101], [217], RS [47]-[48].
13. **Principal purpose.** For the purposes of s 177J, PepsiCo/SVC entered into or carried out the Scheme for a principal purpose including a purpose of obtaining a tax benefit or obtaining a tax benefit and reducing foreign tax liabilities: AS [75], AR [26]-[37]. The members of the Federal Court did not err in so finding: PJ [465], FC [133] (Perram and Jackman JJ), [218] (Colvin J); cf RS [60]-[77].

2 April 2025

  
Kristen Deards SC