HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND BELL JJ

Matter Nos M117/2010, M118/2010, M119/2010 & M120/2010

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

BHP BILLITON LIMITED — RESPONDENT

Matter Nos M121/2010 & M123/2010

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

BHP BILLITON PETROLEUM (NORTH WEST SHELF) PTY LTD — RESPONDENT

Matter No M122/2010

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

THE BROKEN HILL PROPRIETARY COMPANY PTY LTD — RESPONDENT

Matter Nos M124/2010 & M125/2010

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

BHP BILLITON MINERALS PTY LTD — RESPONDENT

Commissioner of Taxation v BHP Billiton Limited
Commissioner of Taxation v BHP Billiton Petroleum (North West Shelf) Pty Ltd
Commissioner of Taxation v The Broken Hill Proprietary Company Pty Ltd
Commissioner of Taxation v BHP Billiton Minerals Pty Ltd
[2011] HCA 17
1 June 2011
M117/2010, M118/2010, M119/2010, M120/2010, M121/2010, M122/2010, M123/2010, M124/2010 & M125/2010

ORDER

In each matter:

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth with H M Symon SC, M T Flynn and L W L Armstrong for the appellant (instructed by Australian Government Solicitor)

D H Bloom QC with J W De Wijn QC, L A Hespe and K J Deards for the respondents (instructed by Mallesons Stephen Jaques)

CATCHWORDS

Commissioner of Taxation v BHP Billiton Limited
Commissioner of Taxation v BHP Billiton Petroleum (North West Shelf) Pty Ltd
Commissioner of Taxation v The Broken Hill Proprietary Company Pty Ltd
Commissioner of Taxation v BHP Billiton Minerals Pty Ltd

Income tax – Allowable deductions – Funds advanced for construction of plant and facilities – Div 243 of *Income Tax Assessment Act* 1997 (Cth) ("Act") required taxpayer to include additional amount in assessable income at termination of limited recourse debt arrangement if limited recourse debt used to finance or refinance expenditure and certain other criteria met – "Limited recourse debt" relevantly defined in s 243-20(2) of Act as debt where creditor's rights against debtor in event of default capable of being limited to rights in relation to financed property or property provided as security for debt, having regard to various factors – Wholly-owned subsidiary ("BHPDRI") of parent company ("BHPB") partly financed capital expenditure for processing plant with monies borrowed from other wholly-owned subsidiary ("Finance") – Finance wrote off balance of loan as irrecoverable – BHPDRI and BHPB claimed capital allowance deductions for project expenditure – Appellant applied Div 243 of Act to reduce deductions – Whether loan from Finance to BHPDRI "limited recourse debt" under s 243-20(2) of Act – Whether BHPDRI and Finance dealing at arm's length – Meaning of "capable of being limited" in s 243-20(2) of Act.

Words and phrases – "capable of being limited", "capital allowance deductions", "limited recourse debt".

Income Tax Assessment Act 1997 (Cth), ss 243-15(1), 243-20(1), 243-20(2).

1 FRENCH CJ, HEYDON, CRENNAN AND BELL JJ. These nine appeals arise out of the Commissioner's application of Div 243 of the *Income Tax Assessment Act* 1997 (Cth) ("the Act") to reduce "capital allowance"[1] deductions in the circumstances described below. It was agreed at trial that the outcome in four appeals brought by BHP Billiton Limited ("BHPB") concerning reversal of capital allowance deductions for the income years 2003 to 2006 would also determine the appeals of other respondents, all subsidiaries of BHPB.

2 BHPB was incorporated in 1885 and is the ultimate parent company of a diversified public company group ("BHPB Group") of multinational natural resource companies. In the period relevant to the proceedings, the BHPB Group included a minerals group which undertook the exploration of minerals and included the production and processing of iron ore. The BHPB Group has within it a corporate services group, which provides transactional services, including finance, to other members of the Group. From 1 July 2002, BHPB formed a consolidated group for income tax purposes[2].

3 The issue in dispute is whether a loan from one wholly-owned subsidiary of BHPB, BHP Billiton Finance Limited ("Finance") to BHP Billiton Direct Reduced Iron Pty Ltd ("BHPDRI") was a "limited recourse debt" within the meaning of Div 243 of the Act. BHPDRI is a wholly-owned subsidiary of BHP Minerals Holdings Pty Ltd ("Holdings") which is in turn a wholly-owned subsidiary of BHPB.

The facts

4 On 29 June 1995, the BHPB board approved capital expenditure of $1,550 million for the design, construction and commissioning of an iron briquette processing plant and associated facilities for converting iron ore fines into briquettes at Boodarie near Port Hedland in Western Australia. Iron ore fines are of little, if any, economic value and are an impediment to the extraction and sale of ore because of the need to store the fines. Apart from enabling more lump ore to be extracted, the conversion of iron ore fines to briquettes would satisfy obligations of BHPB to the government of Western Australia to carry out secondary processing of iron ore.

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1 Defined in s 995-1 of the Act.

2 Pursuant to s 703-50 of the Act.

5 BHPDRI was to be the project entity which owned the plant and associated facilities and was to be funded 50 per cent through a subscription of equity from Holdings and 50 per cent through borrowing from Finance. In October 1995 and May 1996, Holdings respectively subscribed for 35 million and 75 million $1 shares in BHPDRI.

6 At all relevant times, Finance was the principal financier to the BHPB Group and Finance borrowed funds from numerous financial institutions and issued promissory notes and commercial paper to raise short to medium term finance for lending to companies within the Group.

7 It was not in dispute before the primary judge (Gordon J) that the BHPDRI debt in respect of the project was provided by a loan facility from Finance using Finance's standard lending terms for loans within the Group, which included the payment of interest at a rate higher than the rate at which Finance borrowed funds.

8 The loan was for a standard term of five months but in practice at the expiry date of each five month period the loan was rolled over by Finance, which involved Finance recording the repayment of the loan in one account, together with recording a fresh loan in another account. In the event of a default in payment of the debt or interest, Finance enjoyed all the rights of an unsecured creditor. The first advance under the facility was made on 31 July 1995. The primary judge found that Finance made the loan to BHPDRI in the expectation that the loan would be repaid in full with interest.

9 As matters transpired, the cost of the project exceeded the amount of capital expenditure which had been initially approved. Additional capital expenditure of $123.6 million was approved by the BHPB board in November 1996 to be funded 50 per cent through further subscription of equity by Holdings and 50 per cent through further borrowing from Finance. On 30 January 1997, Holdings subscribed for 370 million $1 shares in BHPDRI.

10 The project experienced technical difficulties and a further review of the project, which commenced in August 1997, recommended further capital expenditure of BHPDRI of $730 million to complete the project, to be funded predominantly by further borrowing from Finance.

11 In March 2000, the BHPB board approved further capital expenditure by BHPDRI of $46 million and resolved that further review of the investment should occur in September 2000.

12 Also in March 2000, the Finance board resolved to engage Ernst & Young as independent experts to report on the carrying value of the BHPDRI. Pending the Ernst & Young report, Finance made a doubtful debt provision in respect of the BHPDRI loan which was then approximately $2,174 million, which left Finance with negative net assets in excess of $940 million. A week later BHPB arranged for an injection of equity into Finance of $950 million.

13 In May 2000, Ernst & Young delivered its report valuing the BHPDRI loan at $346 million. In response, at a meeting held on 3 May 2000, the directors of Finance resolved to treat the balance of the loan, $1,845,833,281, as irrecoverable and bad and directed that it be written off as bad. On 10 May 2000, Finance advised BHPDRI of the write-off of the loan.

14 Between the period ending 31 May 1996 and the period ending 31 May 2000, BHPDRI made repayments to Finance. There was evidence at the trial in respect of the amount of total advances, accrued interest and repayments as set out in the table below:

Year	**Total Advances**	**Interest**	**Repayments**
1996	162,613,101	1,737,114	121,324,036
1997	714,166,536	25,055,103	387,020,313
1998	922,158,724	62,011,398	32,672,768
1999	541,265,343	113,446,003	96,578,777
2000	317,012,389	228,069,216	252,872,533

15 Having regard to the rolling over of the loan every five months, as explained above, when Finance wrote off part of BHPDRI's debt on 3 May 2000, the debt related to a loan of principal of $2,014,599,808 advanced to BHPDRI on 30 November 1999[3]. Thereafter BHPDRI was funded only with share capital and the project continued for another five years.

16 The funds advanced to BHPDRI (together with the proceeds of the share capital subscribed) were used progressively to pay the expenses incurred by BHPDRI in the development and construction of the project's facilities. The expenditure which BHPDRI incurred on the project gave rise to "capital allowance" tax deductions claimed by it in the income years 1996 to 2002. In the income years 2003, 2004, 2005 and 2006, BHPB had claimed the capital allowance deductions as head of the BHPB Group.

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3 Section 243-15(1)(a), set out below at [21], covers debt which has been used to "refinance expenditure".

17 In preparing its income tax return for the year ended 30 June 2000, Finance claimed a bad debt deduction[4] and BHPB applied the commercial debt forgiveness rules[5] to bring about the cancellation or forfeiture of tax deductions and losses and to reduce cost bases in a total amount of $1,427,366,828. There was an issue before the primary judge concerning Finance's entitlement to an allowable deduction in respect of the bad debt which is not part of the current appeals.

18 The Commissioner applied Div 243 of the Act to reduce the capital allowance deductions claimed by BHPB by $603,096,634. As the tax losses of BHPDRI in the income years 2000 to 2002 were transferred to other companies within the BHPB Group, the adjustments made by the Commissioner resulted in reductions in losses transferred to those other companies, which were then reflected in assessments issued to those companies.

19 Following disallowance of objections, BHPB (and those subsidiaries of BHPB which had received transfers of losses from BHPDRI) appealed to the Federal Court of Australia under s 14ZZ(a) of the *Taxation Administration Act* 1953 (Cth).

The applicable legislation

20 Division 243 of the Act[6] applies when an additional amount must be included in a taxpayer's assessable income at the termination of a limited recourse debt arrangement. Section 243-10, the "Guide to Division 243"[7], explains that Div 243 "applies where the capital allowance deductions that have been obtained for expenditure that is funded by the debt[8] and the deductions are excessive having regard to the amount of the debt that was repaid." It is further

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4 Under s 25-35(1)(b) of the Act.

5 Division 245 of Sched 2C of the *Income Tax Assessment Act* 1936 (Cth).

6 Inserted by the *Taxation Laws Amendment Act (No 1)* 2001 (Cth), Sched 2.

7 Section 950-100 provides that a Guide forms part of the Act and s 950-150 provides that a Guide may be considered in determining the purpose and meaning of a provision.

8 As to which, see Div 40 of the Act, inserted by the *New Business Tax System (Capital Allowances) Act* 2001 (Cth), Sched 1.

explained that "[t]he reason for the adjustment is to ensure that, where you have not been fully at risk in relation to an amount of expenditure, you do not get a net deduction if you fail to pay that amount."

21 Section 243-15(1) relevantly provides that Div 243 applies if:

> "(a) limited recourse debt has been used to wholly or partly finance or refinance expenditure; and
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> (b) at the time that the debt arrangement is terminated, the debt has not been paid in full by the debtor; and
>
> (c) the debtor can deduct an amount as a capital allowance for the income year in which the termination occurs, or has deducted or can deduct an amount for an earlier income year, in respect of the expenditure or the financed property."

22 The expression "limited recourse debt" is relevantly defined in s 243-20[9]:

> "(1) A ***limited recourse debt*** is an obligation imposed by law on an entity (the ***debtor***) to pay an amount to another entity (the ***creditor***) where the rights of the creditor as against the debtor in the event of default in payment of the debt or of interest are limited wholly or predominantly to any or all of the following:
>
> (a) rights (including the right to money payable) in relation to any or all of the following:
>
> (i) the debt property or the use of the debt property;
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> (ii) goods produced, supplied, carried, transmitted or delivered, or services provided, by means of the debt property;
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> (iii) the loss or disposal of the whole or a part of the debt property or of the debtor's interest in the debt property;

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9 Section 995-1 provides:

> "in determining whether parties deal at ***arm's length***, consider any connection between them and any other relevant circumstance."

(b) rights in respect of a mortgage or other security over the debt property or other property;

(c) rights that arise out of any arrangement relating to the financial obligations of an end-user of the financed property towards the debtor, and are financial obligations in relation to the financed property.

(2) An obligation imposed by law on an entity (the ***debtor***) to pay an amount to another entity (the ***creditor***) is also a ***limited recourse debt*** if it is reasonable to conclude that the rights of the creditor as against the debtor in the event of default in payment of the debt or of interest are capable of being limited in the way mentioned in subsection (1). In reaching this conclusion, have regard to:

(a) the assets of the debtor (other than assets that are indemnities or guarantees provided in relation to the debt);

(b) any arrangement to which the debtor is a party;

(c) whether all of the assets of the debtor would be available for the purpose of the discharge of the debt (other than assets that are security for other debts of the debtor or any other entity);

(d) whether the debtor and the creditor are dealing at arm's length in relation to the debt." (footnotes omitted)

23 There are two other definitions of a "limited recourse debt", not presently relevant, in sub-ss (3) and (4). A debt will be a limited recourse debt if it falls within any one of the four definitions and is not excluded by sub-ss (5) and (6)[10].

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10 Sub-section (6) provides:

> "Also, an obligation that is covered by subsections (1), (2) or (3) is not a limited recourse debt if, having regard to all relevant circumstances, it would be unreasonable for the obligation to be treated as limited recourse debt."

24 The expressions "financed property"[11] and "debt property[12] are defined in s 243-30. Section 243-25 defines the various circumstances in which a debt is taken to terminate.

25 The appeals turn essentially on the question of what is encompassed by the statement in s 243-20(2) that the rights of a creditor as against a debtor, in the event of default, "are *capable of being limited* in the way mentioned in subsection (1)." (emphasis added)

26 It can be noted that Div 245 in Sched 2C of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"), which predated the introduction of Div 243 into the Act by three years, introduced new rules for dealing with the "Forgiveness of commercial debts"[13]. Prior to the introduction of Div 245, upon the forgiveness of debt, the creditor was entitled to a bad debt deduction or a capital loss and the debtor would be entitled to deduct losses accumulated before the debt was terminated and to claim capital allowance deductions for expenditure funded by the forgiven debt. This perceived "structural weakness"[14] was addressed by

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11 Section 243-30(1) provides:

> "Property is the ***financed property*** if the expenditure referred to in paragraph 243-15(1)(a) is on the property, is on the acquisition of the property, results in the creation of the property or is otherwise connected with the property."

12 Section 243-30(3) provides:

> "Property is the ***debt property*** if:
>
> (a) it is the financed property; or
>
> (b) the property is provided as security for the debt."

13 Division 245 of the 1936 Act was subsequently repealed by the *Tax Laws Amendment (Transfer of Provisions) Act* 2010 (Cth), Sched 2. That Act also inserted a similar but not identical Div 245 into the Act.

14 See the Second Reading Speech, Taxation Laws Amendment Bill (No 2) 1996, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 June 1996 at 3061:

> "Notwithstanding that the act of forgiveness relieves the debtor of the economic loss represented by the debt, tax losses that accumulated before

(Footnote continues on next page)

Div 245 of the 1936 Act, which was directed to ensuring that the economic benefit of a taxpayer being forgiven a debt was properly taxed. This was achieved by applying the value of the forgiven debt to reduce accumulated revenue losses, then capital losses, then other deductions and finally the cost bases of assets.

27 At all material times, both Div 243 of the Act and Div 245 of the 1936 Act were concurrently in force, but s 243-75 provided that if there was an overlap between the two provisions Div 243 should be applied first.

28 Subdivision 243-B of the Act provides for the working out of excessive deductions.

The decisions below

Primary judge

29 The primary judge found that limited recourse debt was not used wholly or partly to finance or refinance BHPDRI's expenditure and accordingly Div 243 had no application to BHPDRI's debt with Finance.

30 During the course of determining several issues before her, the primary judge found that Finance's lending accorded with the description of the essential business of a finance company in *Avco Financial Services Ltd v Federal Commissioner of Taxation*[15]. Her Honour found that Finance was not a sham or a mere conduit for its parent but was in the business of lending money for profit making[16].

31 Her Honour noted that each decision to invest or reinvest in the BHPDRI project was taken on the basis that there would be a return on the project. Initially a payback period of five years from the project's completion was

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the debt was terminated generally remain available to shield future income from taxation."

15 (1982) 150 CLR 510 at 527; [1982] HCA 36.

16 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 778-779 [104] and [107].

expected[17], although this was adjusted in 1997 to an expectation of a payback period of six to seven years[18]. Further, her Honour characterised the decisions made throughout the life of the project as "a series of reasonable and diligent decisions" made "on the basis of obtaining the best possible return in circumstances that were not ideal"[19]. It must be accepted that her Honour's observation was not confined to Finance.

32 When her Honour came to consider the application of s 243-20(1), she rejected the Commissioner's argument that Finance's *practical* rights of recovery or recourse against BHPDRI were wholly or at least predominantly limited to BHPDRI's assets at the plant at Boodarie[20].

33 In dealing with submissions concerning s 243-20(2) the primary judge said that s 243-20(2) did not adopt or incorporate a test of economic equivalence, which she regarded as "the substance if not the form of the Commissioner's submissions"[21] in relation to that provision. Her Honour regarded the interaction between Div 245 in Sched 2C of the 1936 Act and Div 243 of the Act as supporting her Honour's rejection of the economic equivalence argument[22].

34 Her Honour made orders allowing the appeals from the Commissioner's disallowance of objections.

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17 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 760 [28].

18 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 763 [42].

19 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 780-781 [114].

20 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 800-801 [212]-[213] and 801 [216].

21 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 804 [229].

22 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 805 [231]-[232].

The Full Court

35 The Full Court (Sundberg and Stone JJ agreeing with the reasons of Edmonds J) dismissed the appeals from orders made by the primary judge. Edmonds J identified the legislative policy underlying Div 243, by reference to s 243-10, as being a policy to reverse capital allowance deductions that have been obtained for expenditure that is funded by debt where the debtor is not fully at risk in relation to the expenditure and the debt is not fully repaid[23].

36 On that basis, his Honour construed s 243-20(1) and (2) correctly as confined to situations where, at the time of borrowing, the debtor is not fully at risk in relation to expenditure because of contractual limitations on the lender's rights of recourse on a relevant event of default (s 243-20(1)) or where, at the time of borrowing, the debtor, or someone else, has the capacity to bring about that state of affairs subsequently (s 243-20(2))[24]. In so doing his Honour rejected the Commissioner's submission that s 243-20(2) requires consideration of possibilities for contractual variation which exist at the time of borrowing, a submission which was further developed before this Court.

37 Both the primary judge[25] and the Full Court[26] expressed concern that, if the Commissioner's construction of s 243-20(1) and (2) were accepted, reversal of capital allowance deductions by including equivalent amounts in assessable income would depend on the success of projects, which would be particularly significant for special purpose project companies with few assets at the time of borrowing. Edmonds J considered that this would have the practical effect that new projects could only be undertaken easily in established companies with unencumbered assets which, at the time of borrowing, exceed the borrowing in value.

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23 *Federal Commissioner of Taxation v BHP Billiton Finance Ltd* (2010) 182 FCR 526 at 581 [103].

24 *Federal Commissioner of Taxation v BHP Billiton Finance Ltd* (2010) 182 FCR 526 at 581 [104].

25 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 801 [216].

26 *Federal Commissioner of Taxation v BHP Billiton Finance Ltd* (2010) 182 FCR 526 at 582 [107].

Submissions

38 There was no dispute between the parties that pars (b) and (c) of s 243-15(1) were satisfied. The only issue was whether, under par (a), the obligation of BHPDRI to repay its loan to Finance to "refinance expenditure" was limited recourse debt, as defined in s 243-20.

39 Further, the Commissioner accepted the construction of s 243-20(1) of the primary judge, upheld in the Full Court, that the reference in s 243-20(1) to the rights of the creditor as against the debtor, in the event of default, being limited to recourse against debt property is a reference to a legal, here a contractual, limitation on the creditor's right of recourse. Accordingly, in the circumstances of the appeal (and in contrast to the way the Commissioner's case was primarily argued below) the Commissioner proceeded on these appeals on the basis that s 243-20(1) does not apply to the loan between Finance and BHPDRI.

40 Before the primary judge the Commissioner submitted that s 243-20(2) was intended to catch those arrangements which have the capacity to bring about a limitation on a creditor's rights of the kind described in sub-s (1). The primary judge accepted that submission[27]. The Commissioner further elaborated submissions on the point in these appeals and demonstrated that the Commissioner's case on the appeals before this Court did not lie outside the compass of the case run at trial.

Construction

41 In this Court, the Commissioner contended that s 243-20(2) is concerned neither with current contractual limitations or rights, nor with economic equivalence, but rather with "a practical capacity or ability to bring about legal limitations on legal rights" irrespective of whether there is any arrangement to which the debtor is a party (s 243-20(2)(b)).

42 The Commissioner contended that the expression "capable of", as used in relation to rights in s 243-20(2), means "susceptible to"[28]. That construction was said to encompass "the possibility of contractual variation" between the creditor and the debtor. In urging that construction, and in recognising that any contract

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27 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 804 [228].

28 *The Oxford English Dictionary*, 2nd ed (1989), vol 2 at 856, senses (3) and (4).

may be subsequently varied, the Commissioner sought to distinguish between a legal right which was "theoretically capable" of being varied and one which was "practically or commercially susceptible" to being varied. It was urged that the word "capable" in s 243-20(2) evoked "practical and commercial considerations rather than highly refined legalistic tests" or theoretical considerations. That submission had its source in *Canwest Global Communications Corporation v Australian Broadcasting Authority*[29], a case concerning a question of control of television licences, in which the tax cases referred to below[30] were distinguished.

43 Thus, so the argument went, where a creditor's rights were, in practice, susceptible to being altered, so as to introduce a legal limitation on the rights of the creditor against the debtor in the event of default, then the debtor "has not been fully at risk in relation to the amount of the expenditure" funded by the debt.

44 The respondents contended that the "capacity" to which s 243-20(2) must refer is a capacity existing at the time of the inception of the loan to bring about legal limitations on contractual rights in the future. It was submitted that the expression "capable of being limited" is not qualified to mean capable of being "practically limited" but must refer to a capacity for limitation as a present attribute (that is, at the time of borrowing), rather than the mere possibility that the attribute might exist in the future. The respondents' contention – that a practical susceptibility to being altered was not what was covered by the expression "capable of being limited" – had the result that the respondents characterised as speculative the Commissioner's contention that such a susceptibility meant that the debtor had not been fully at risk in relation to expenditure funded by the debt.

45 A consideration of context in the widest sense[31] helps to establish the meaning and reach of s 243-20(2) and the particular statement that a creditor's rights are "capable of being limited". One wide contextual consideration is that Div 243 of the Act can be expected to operate harmoniously with any applicable companies legislation regulating the conduct of corporate taxpayers. It is also appropriate to recognise that, as well as containing Div 243, the Act makes

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29 (1998) 82 FCR 46 at 77-83.

30 At [50]-[52].

31 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2.

specific and detailed provisions in respect of bad debt deductions[32] and the 1936 Act dealt specifically with commercial debt forgiveness[33]. Even accepting some overlap between the Divisions, a loan which fell within Div 243 at the relevant time must be capable of being distinguished from a loan which fell within Div 245 as it then stood.

46 The mischief to which Div 243 was directed, described in s 243-10, is that a taxpayer may obtain deductions greater than the total amounts outlaid in relation to capital expenditure. In the Explanatory Memorandum to the Bill which introduced the provision, an example[34] is given of the mischief as occurring "where the balance of an outstanding debt that has financed the expenditure is not paid and the financier can only recover a specific asset on the termination of the financial arrangement." Then it is stated[35]:

> "Under ***new subsection 243-20(2)***, a debt is also limited recourse if, notwithstanding that there may be no specific conditions to that effect, it is reasonable to conclude that the creditor's rights against the debtor are able to be limited, directly or indirectly, to those property rights specified in ***new subsection 243-20(1)*** in relation to the financed property."

47 While such statements illuminate, they do not overcome the need to consider the words of the section[36].

48 Section 243-20(2) plainly has a different area of operation from s 243-20(1), which encompasses express contractual limits on a creditor's rights of recourse in the event of default. Parties to a loan contract have an undoubted

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32 Section 25-35(1)(b) of the Act.

33 Division 245 of Sched 2C of the 1936 Act.

34 Australia, House of Representatives, Taxation Laws Amendment Bill (No 5) 1999, Explanatory Memorandum at 16 [2.6].

35 Australia, House of Representatives, Taxation Laws Amendment Bill (No 5) 1999, Explanatory Memorandum at 32 [2.73].

36 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31]-[32]; [2010] HCA 23; see also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

power to vary or amend their contract subsequently[37]. By way of contrast sub-s (2) is directed to legal limitations on legal rights which arise otherwise than by contract.

49 Viewed in isolation the general word "capable" has different, even opposite, applications[38], which demonstrates afresh the well-recognised danger of making "a fortress out of the dictionary"[39] when interpreting a statute. The expression to be construed is "capable of being limited".

50 The respondents relied on two tax cases, *W P Keighery Pty Ltd v Federal Commissioner of Taxation*[40] and *Federal Commissioner of Taxation v Sidney Williams (Holdings) Ltd*[41]. The question in *Keighery's* case was whether, for the purposes of income tax legislation, a company was a "private company", that is, relevantly, a company "capable of being controlled … by one person or by persons not more than seven in number"[42]. In a joint judgment, Dixon CJ, Kitto and Taylor JJ dealt with an argument that "capable of being controlled" encompassed the possibility of control from a power existing at the last day of the year of income. Their Honours said[43]:

> "It must be acknowledged, of course, that it is the capability, and not the control, which must exist on the last day of the year of income. But to describe a company as capable of being controlled by a person or group of persons is to attribute to that person or group a presently existing power of control. 'Capable of being controlled' in this context cannot be interpreted so widely as to be satisfied whenever a possibility of obtaining

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37 *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 533-534 [22]-[24]; [2000] HCA 35.

38 *Federal Commissioner of Taxation v Sidney Williams (Holdings) Ltd* (1957) 100 CLR 95 at 115 per Webb J; [1957] HCA 1; see also *The Oxford English Dictionary*, 2nd ed (1989), vol 7 at 856.

39 *Cabell v Markham* 148 F 2d 737 at 739 (1945).

40 (1957) 100 CLR 66; [1957] HCA 2.

41 (1957) 100 CLR 95.

42 *Keighery* (1957) 100 CLR 66 at 83.

43 *Keighery* (1957) 100 CLR 66 at 86.

control over the company exists by reason of something in its constitution or its special circumstances. The natural sense of the expression is that of possessing, as a present attribute, a liability to be controlled."

51 In *Sidney Williams*, Dixon CJ, Kitto and Taylor JJ stated[44] that if persons "may obtain in the future" an ability to control the company, all that can be said of the company as at the last day of the year of income is "that it is capable of being thereafter made controllable by those persons."

52 *Keighery's* case and *Sidney Williams* were relied upon by a Full Court of the Supreme Court of Victoria (Murphy, Fullagar and Gobbo JJ) in *Equiticorp Industries Ltd v ACI International Ltd*[45] to support the proposition that "when one speaks of a company capable of being controlled in terms of voting power … one looks for an enforceable and presently and immediately existing right enabling the voting power to be controlled."

53 To describe a creditor's rights of recourse as "capable of being limited" is to refer to a power of a person to limit or bring about a limitation on those rights. In possible deference to the definition of "arrangement" in the Act[46], it was accepted by the respondents in argument that s 243-20(2) is not necessarily confined to enforceable arrangements; however, this case does not call for any decision about an unenforceable arrangement. It is the certain liability of the creditor's rights of recourse to limitation – by the exercise by a person of a power to limit, or to cause a limitation to those rights – which has the effect that a debtor has not been fully at risk in relation to an amount of expenditure. Such a power must exist at the inception of the loan, whether it arises as a result of an arrangement or a circumstance or conduct (from which an arrangement may be inferred[47]) or in some way other than the way covered by sub-s (1). It follows that s 243-20(2) would not be satisfied by the existence, at the inception of the

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44 *Sidney Williams* (1957) 100 CLR 95 at 111.

45 [1987] VR 485 at 489.

46 Section 995-1 of the Act provides:

> "***arrangement*** means any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings."

47 *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 443-444; [1978] HCA 55.

loan, of a possibility of a person acquiring a capacity (that is a power) to limit, or a power to cause the relevant limitation of, a creditor's rights of recourse at some point in the future.

54 Otherwise it would seem that all loans used by a debtor to acquire property, including loans for special purpose projects involving a corporate group and intra-group financing, must be characterised as giving rise to obligations which must be treated as limited recourse debts within s 243-20(2), even though the provision is directed at a debtor taxpayer who has not been fully at risk in relation to an amount of expenditure. Such an interpretation carries the potential, recognised by Edmonds J, for discouraging investment in special purpose projects.

55 The interpretation of s 243-20(2) set out in these reasons aligns closely with the language of the Act, which supports the clear legislative purpose[48] of allowing an adjustment of a taxpayer's income if the taxpayer has not been fully at risk in respect of an amount of expenditure. Secondly, the interpretation gives a clear operation to s 243-20(2) and excludes a conjectural approach to the question of whether an adjustment should be made to a taxpayer's income. This fits with the character of the provision as one which affects liability to taxation. Thirdly, this construction facilitates obedience in circumstances where, despite overlap, a debtor taxpayer wishes to determine whether a debt is capable of being dealt with as a commercial debt which has been forgiven or whether it should be dealt with as a limited recourse debt.

Application

56 Whether or not a debt falls within s 243-20(2) is to be determined by the factual exercise there set out. The Commissioner applied his construction of s 243-20(2) to underpin a submission that, having regard to the four factors made relevant by pars (a) to (d) inclusive of s 243-20(2), it is reasonable to conclude that Finance's contractual rights against BHPDRI, in the event of default, were capable of being restricted – at the instance of BHPB – to rights against the debt property of BHPDRI.

57 The Commissioner did not rely on par (b). In essence, the Commissioner's argument in respect of pars (a) and (c) was that the extent of

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48 *Thompson v His Honour Judge Byrne* (1999) 196 CLR 141 at 159 [49] per Gaudron J; [1999] HCA 16; see also *Mills v Meeking* (1990) 169 CLR 214 at 236-237 per Dawson J; [1990] HCA 6.

Finance's ability to recover its loan was substantially limited to BHPDRI's plant; that, therefore, there was "no economic disincentive" to Finance accepting a contractual variation formulating the limitation; and that it was therefore reasonable to conclude that there was a capacity in BHPB to procure Finance's acquiescence in a modification of its contractual right so as to confine Finance's recourse to property comprising the plant.

58 The respondents relied on extensive assets of BHPDRI in evidence before the primary judge including general purposes leases and intellectual property and her Honour's conclusion[49] that "[i]t was by no means clear that all of [BHPDRI's] property was located at or connected with the plant at Boodarie." It was not contested that all of BHPDRI's assets remained available at all relevant times for the purpose of discharging the debt. Finance's status of unsecured creditor gave it no right to any particular asset belonging to BHPDRI, such as the plant[50].

59 In relation to par (d) it was contended by the Commissioner that the relationship between BHPDRI and Finance was not at arm's length. It was asserted that Finance's conduct in postponing repayment of the loan for a period of 12 months (which was in place at the time of the November rollover) and in not seeking repayment, and Finance's notification to BHPDRI that it would not seek recovery of the amount reported to be irrecoverable, evidenced the fact that Finance and BHPDRI were not dealing at arm's length in relation to the loans.

60 The respondents submitted that the question as to whether or not BHPDRI and Finance dealt with each other at arm's length is posed in relation to the debt and that the unchallenged findings of the primary judge supported the conclusion that Finance and BHPDRI dealt with each other at arm's length. That argument reflected a distinction relevant to related party transactions, recognised by Habersberger J in *Orrong Strategies Pty Ltd v Village Roadshow Ltd*[51], between parties being at arm's length and parties dealing with each other at arm's length. Paragraph (d) of s 243-20(2) expressly refers to a "dealing"[52]. Something more

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49 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 802 [218].

50 *Inland Revenue Commissioners v Herdman* [1969] 1 WLR 323 at 327; [1969] 1 All ER 495 at 511.

51 (2007) 207 FLR 245 at 411-413 [719]-[724].

52 See also the definition of "arm's length" in s 995-1 of the Act, set out above at note 9.

will be said shortly about the relationship between the parties to the loan and the parent company, BHPB.

61 Reliance was also placed by the Commissioner on what was described as the BHPB Group's *modus operandi* under which difficulties in respect of intra-group obligations were resolved.

62 In *Walker v Wimborne*[53], Mason J referred to the principle that each company within a corporate group is "a separate and independent legal entity" with duties imposed by the applicable companies legislation. That this is so was reaffirmed more recently by this Court in *NEAT Domestic Trading Pty Ltd v AWB Ltd*[54]. In a joint judgment, McHugh, Hayne and Callinan JJ recognised that a wholly-owned subsidiary may be required to pursue the interests of its parent (and its parent's shareholders) to the extent that those obligations are compatible with other obligations of the subsidiary imposed by the applicable companies legislation and applicable judge-made law[55]. It is not in contest that on 23 March 2000 the directors of the BHPB board approved additional capital expenditure for BHPDRI, but Finance provided no additional funding and Finance took steps already outlined above. Finance had external creditors. As at 30 June 2000, Finance owed approximately $37 billion to third parties. While the primary judge recognised that Finance may have acted in the BHPB Group's interests, as already noted, her Honour went on to find that Finance was not a sham[56]. The Commissioner affirmed in oral argument that he does not allege that Finance is a sham. Rather, the Commissioner submitted that it was sufficient for the purposes of s 243-20(2) to show that "[t]he corporate mind of Finance, properly exercised, was legitimately able to have Finance give up rights against [BHPDRI] if the giving up of those rights was in the interests of the [BHPB] Group as a whole."

63 Finally, after a consideration of the factors in pars (a), (c) and (d), it was contended by the Commissioner that the structure and *modus operandi* of the BHPB Group support the reasonableness of a conclusion that Finance, from the inception of the BHPDRI loans, would have complied with a request or direction from BHPB to accept a contractual limitation on its rights of recourse against

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53 (1976) 137 CLR 1 at 7; [1976] HCA 7.

54 (2003) 216 CLR 277; [2003] HCA 35.

55 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 296 [47].

56 *BHP Billiton Finance Ltd v Federal Commissioner of Taxation* (2009) 72 ATR 746 at 777-778 [103]-[104].

BHPDRI in the event of default if it was expedient to do so or if, in BHPB's assessment, it was in the interests of the BHPB Group to do so. That the construction of s 243-20(2) contended for by the Commissioner will give rise to a conjectural approach to the question of whether a taxpayer's income should be adjusted is exemplified by this submission.

64 The crucial submission of the respondents on this aspect of the case is that the Commissioner's contention that Finance would have complied with a request or direction from BHPB to modify its contractual rights of recourse so as to confine its recourse to the plant was "unsupported by any evidence and is … entirely speculative". The submission can be assessed in the light of the construction of s 243-20(2) set out in these reasons.

65 The Commissioner's case supporting the application of Div 243 to BHPDRI's debt with Finance was consistent with the construction of s 243-20(2) proposed by him. The Commissioner's identification of a "practical capacity" in BHPB, existing at the inception of the loan, to cause a relevant limitation on Finance's rights of recourse against BHPDRI, by giving a request or direction to Finance so to limit its rights, never rose above being a possibility of what might happen if certain contingencies arose. Because s 243-20(2) is not directed to possibilities for a limitation of a creditor's rights of recourse which may arise in the future, s 243-20(2) does not apply to BHPDRI's debt to Finance. That conclusion renders it unnecessary for this Court to resolve the factual contest concerning the factors in pars (a), (c) and (d).

Conclusion

66 Having regard to the construction of s 243-20(2) set out in these reasons, there was no error in the primary judge's conclusion that the loan between Finance and BHPDRI did not give rise to a limited recourse debt within the meaning of s 243-20(2). It follows that the orders made by the Full Court should be upheld.

Orders

67 The appeals should be dismissed with costs.

68 GUMMOW J. The Court heard together nine appeals from the decision of the Full Court of the Federal Court (Sundberg, Stone and Edmonds JJ)[57], dismissing appeals against the decision of the primary judge (Gordon J)[58]. Her Honour set aside the decisions of the appellant ("the Commissioner") disallowing objections to assessments to income tax. Pursuant to s 14ZZP of the *Taxation Administration Act* 1953 (Cth) ("the Administration Act"), the primary judge allowed the objections and remitted the matters to the Commissioner to reassess the taxpayers in accordance with law. The objections related to the four consecutive years of income beginning with that ending 30 June 2003.

69 BHP Billiton Limited ("BHP") is a listed company and its directly or indirectly wholly-owned subsidiaries include BHP Billiton Finance Limited ("BHP Finance") and BHP Billiton Direct Reduced Iron Pty Ltd ("BHP Reduced Iron"). From 1 July 2002 the companies formed a consolidated group pursuant to s 703-50 of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act").

70 BHP Finance raised for the purposes of the BHP Group large sums by loan facilities in various currencies and by the issue of promissory notes and commercial paper. BHP Finance applied those funds by making loans to other members of the BHP Group on terms which had been adopted by Board resolution on 30 November 1994 and which did not purport to limit the rights of BHP Finance as an unsecured creditor of the borrowers. The Commissioner has expressly disclaimed in this Court any reliance upon the existence of any arrangement, contrary to those terms, to which BHP Finance was a party.

71 As applied to the borrowings by BHP Reduced Iron from BHP Finance with which this litigation is concerned, the loans were each for a five month term, with interest in Australian dollars at 11.4 per cent reducible to 11.2 per cent for prompt payment. This interest rate was higher than that payable by BHP Finance on its borrowings and BHP Finance earned substantial interest income. This generated substantial accounting profits after tax and taxable income.

72 The evidence is silent upon these further points, but it may be observed that the third party sources of funds to BHP Finance would have had a strong interest in any purported limitation upon the rights of recovery by BHP Finance of funds it had lent on to members of the BHP Group, and the listing requirements of exchanges upon which BHP was listed may have had a similar significance. Nevertheless, the Commissioner has sought to characterise the relevant dealings by BHP Finance as of a "non-arm's length nature".

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57 (2010) 182 FCR 526.

58 (2009) 72 ATR 746.

73 As is more fully explained by the joint reasons[59], the Board of BHP approved the construction of plant and facilities required for the manufacture, near Port Hedland in Western Australia, of iron briquettes using iron ore fines as feedstock ("the Project"). The expenditure to build the plant and associated facilities for the Project was assessed at $1,550 million. BHP Reduced Iron was to undertake the Project. This company was funded partly by share capital and partly by a loan facility provided by BHP Finance on the standard terms referred to above.

74 The picture this presented is the not unfamiliar one whereby one member of a company group undertakes a particular development project with finance provided by another member of the group.

75 However, the Project had a particular characteristic, the strong involvement of the State of Western Australia. BHP Reduced Iron was the holder of a combined total of 195 general purpose leases under the *Mining Act* 1978 (WA) and was party to an agreement with the State made on 16 October 1995 and contained as Sched 1 to the *Iron Ore – Direct Reduced Iron (BHP) Agreement Act* 1996 (WA). This recites the agreement of the State to assist in the establishment and operation of a direct reduction plant at Port Hedland.

76 The Project did not prosper. Further capital expenditures had been required to complete the Project, as explained in the joint reasons[60]. The Project was suspended in May 2004 when one employee died in an industrial accident and two others were severely injured. In November 2004, the plant was placed in care and maintenance while a review of options for the future of the Project was determined. Eventually, in May 2005, BHP announced that the Project was to be terminated. There were significant revenue consequences which have given rise to this litigation. The parties agreed before the primary judge that the outcome in the appeals brought by BHP under s 14ZZ(a) of the Administration Act concerning the years 2003 to 2006 would determine the appeals by the subsidiaries which had received transfers of losses from BHP Reduced Iron.

77 The expenditure of some $2.1 billion which BHP Reduced Iron incurred on the design and construction of the Project gave rise to "capital allowance" deductions as defined in s 995-1 of the 1997 Act[61]. These deductions were claimed by that company itself for the years 1996-2002, and by BHP for the

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59 At [1]-[3].

60 At [4]-[9].

61 The definition includes deductions under Div 40 (capital allowances) and Div 43 (capital works).

years 2003-2006 in its capacity as "head" company of the tax consolidated BHP group.

78 The expenditure by BHP Reduced Iron on the Project in part was funded by advances by BHP Finance totalling some $2,657 million. Of those advances, BHP Finance in May 2000 wrote off $1,845 million. The Commissioner then sought to apply Div 243 of the 1997 Act:

(a) to disallow capital allowance deductions totalling $603,096,634 claimed by BHP in respect of the Project for the income tax years 2003-2006;

(b) to decrease by $430,764,520 the capital allowance deductions allowed BHP Reduced Iron in respect of the Project for the income tax years 2001 and 2002; and

(c) to increase by $380,850,062 the assessable income of BHP Reduced Iron for the income tax year 2000.

79 On 24 July 2004 the Commissioner conducted an audit into the financial arrangements of BHP Reduced Iron. A Position Paper was issued on 7 June 2007 to which BHP replied on 31 August 2007. On 29 November 2007 a Notice of Assessment was issued applying Div 243 of the 1997 Act to reduce the capital allowance deductions claimed by BHP Reduced Iron for the years ended 30 June 2003 to 30 June 2006.

80 BHP Reduced Iron transferred its tax losses in the years 2000 to 2002 to other companies in the BHP Group, and the above adjustments by the Commissioner resulted in reductions in those transferred amounts. This was reflected in assessments issued to a number of the transferees and they became the appellants, with BHP itself, under s 14ZZ(a) of the Administration Act.

81 Section 243-10 purports to tell the reader what Div 243 "is about". It reads:

> "This Division tells you when you must include an additional amount in your assessable income at the termination of a limited recourse debt arrangement. It also tells you what the additional amount is.
>
> Basically, the Division applies where the capital allowance deductions that have been obtained for expenditure that is funded by the debt and the deductions are excessive having regard to the amount of the debt that was repaid.
>
> The reason for the adjustment is to ensure that, where you have not been fully at risk in relation to an amount of expenditure, you do not get a net deduction if you fail to pay that amount."

82 The Division only applies if a "limited recourse debt" has been used to wholly or partly finance or refinance expenditure (s 243-15(1)(a)). The term "limited recourse debt" then is defined at length in s 243-20, sub-ss (1) and (2) of which will be set out below. An obligation covered by sub-ss (1) or (2) will not be a "limited recourse debt" if "having regard to all relevant circumstances" it would be "unreasonable" so to treat it (s 243-20(6)).

83 The Commissioner does not contend that Div 243 is an "anti-avoidance" provision like Pt IVA of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"), and accepts both that the Division refers to legal rights and that in construing its provisions notions of ordinary commercial dealings are to be taken into account.

84 Nor does the Commissioner agitate on these appeals the conclusion of the Full Court[62] that the primary judge made no error in finding BHP Finance did not enter into or carry out a scheme for the dominant purpose of obtaining a tax benefit so that Pt IVA of the 1936 Act was not brought into operation.

85 It is the construction of s 243-20 which is challenged by the Commissioner in this Court. The appeal by the Commissioner to the Full Court having been dismissed, the Commissioner seeks in this Court to contest that s 243-20(2) is engaged where the legal rights of a creditor against a debtor, in the event of a default, are capable of a legal limitation in the way mentioned in s 243-20(1). For the reasons which follow, the appeals to this Court should be dismissed.

86 Before turning to the comprehensive reasons of the primary judge, it is convenient to set out s 243-20(1) and (2):

> "(1) A *limited recourse debt* is an obligation imposed by law on an entity (the *debtor*) to pay an amount to another entity (the *creditor*) where the rights of the creditor as against the debtor in the event of default in payment of the debt or of interest are limited wholly or predominantly to any or all of the following:
>
> (a) rights (including the right to money payable) in relation to any or all of the following:
>
> (i) the debt property or the use of the debt property;
>
> (ii) goods produced, supplied, carried, transmitted or delivered, or services provided, by means of the debt property;

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62 (2010) 182 FCR 526.

(iii) the loss or disposal of the whole or a part of the debt property or of the debtor's interest in the debt property;

(b) rights in respect of a mortgage or other security over the debt property or other property;

(c) rights that arise out of any arrangement relating to the financial obligations of an end-user of the financed property towards the debtor, and are financial obligations in relation to the finance property.

(2) An obligation imposed by law on an entity (the *debtor*) to pay an amount to another entity (the *creditor*) is also a *limited recourse debt* if it is reasonable to conclude that the rights of the creditor as against the debtor in the event of default in payment of the debt or of interest are capable of being limited in the way mentioned in subsection (1). In reaching this conclusion, have regard to:

(a) the assets of the debtor (other than assets that are indemnities or guarantees provided in relation to the debt);

(b) any arrangement to which the debtor is a party;

(c) whether all of the assets of the debtor would be available for the purpose of the discharge of the debt (other than assets that are security for other debts of the debtor or any other entity);

(d) whether the debtor and creditor are dealing at arm's length in relation to the debt." (emphasis in original)

87 The phrase "arm's length", which appears in par (d) of s 243-20(2), is defined in s 995-1(1) as requiring, in any determination where parties deal at arm's length, consideration of "any connection between them and any relevant circumstance".

88 The primary judge referred[63] to the focus of the definitions in s 243-20(1), being one which fixes upon the existence of obligations upon the debtor (in this case BHP Reduced Iron) to repay a creditor (BHP Finance) the amount advanced plus interest. The primary judge then said that s 243-20(2) is intended to operate in the following manner[64]:

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63 (2009) 72 ATR 746 at 800-801 [210]-[213].

64 (2009) 72 ATR 746 at 804 [228].

> "Subsection (2) is clearly intended to catch those debts which bear no existing legal limitation of the kind specified in [sub-s (1)] but where 'it is reasonable to conclude that the rights' in the event of default are 'capable' of being limited to those rights specified in [sub-s (1)]. As the applicants submitted, [sub-s (2)] is intended to catch those arrangements which have the capacity to bring about the limitation described in [sub-s (1)]. The form of that capacity is, unsurprisingly, broad and extends, for example, to 'any arrangement to which the debtor is a party'. It is an objective test. Whether the capacity of the kind described exists is, of course, a question of fact to be resolved having regard to the matters listed in [pars (a) to (d) of sub-s (2)]."

89 The Full Court[65] considered that the primary judge correctly applied s 243-20(1) and (2) and that her Honour did not err in her findings. Edmonds J, who gave the leading judgment, said of these sub-sections[66]:

> "They are to be construed so that their application is confined to situations where, at the time of borrowing, the debtor is not fully at risk in relation to the expenditure because of contractual limitations on the lender's rights of recourse on a relevant event of default or, where, at the time of borrowing, the debtor or someone else has the capacity to subsequently bring about that state of affairs."

90 I agree with what is said by his Honour in that passage. I should add that in this Court the Commissioner eschewed any reliance upon the existence of any "arrangement" to which BHP Reduced Iron was a party, so as to attract par (b) of s 243-20(2).

91 Section 243-20(2) uses the phrase "capable of being limited in the way mentioned in subsection (1)", and the phrase is not qualified. It is not to be taken to mean "practically capable", or "able to be affected" in the future. Rather, the question is resolved in the present appeals by asking whether capacity exists at the inception of each loan by having regard to the four factors listed in pars (a) to (d) (excluding par (b), by reason of the Commissioner's disclaimed reliance upon it).

92 It was submitted by the Commissioner that BHP Finance's contractual rights, at the inception of each loan, were "capable" of restriction should BHP Reduced Iron default by failing to meet its loan and interest repayments to BHP Finance. That was because, the submissions by the Commissioner went, the

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65 (2010) 182 FCR 526 at 581-582 [106]-[108].

66 (2010) 182 FCR 526 at 581 [104].

parties were not dealing at arm's length within the meaning of par (d) of s 243-20(2), and before the Federal Court it had been left up to the taxpayer to prove the contrary. Implicit in these submissions is the contention that unless the taxpayer establishes that par (d) is not satisfied, it is reasonable to conclude (within the meaning of s 243-20(2)) that the rights of the creditor are "capable of being limited in the way mentioned in [s 243-20(1)]".

93 The propositions that par (d) applied in these appeals should be rejected. That being so it is unnecessary to determine whether, if it had applied, that would have led to the reasonable conclusion that the creditors' rights were capable of being limited within the meaning of s 243-20(1).

94 In *Nordland Papier AG v Anti-Dumping Authority*[67] Lehane J considered the definition in s 269TAA(1) of the *Customs Act* 1901 (Cth) for the purposes of the anti-dumping provisions of that legislation. The sub-section reads:

> "(1) For the purposes of this Part, a purchase or sale of goods shall not be treated as an arms length transaction if:
>
> (a) there is any consideration payable for or in respect of the goods other than their price; or
>
> (b) the price is influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or
>
> (c) in the opinion of the Minister the buyer, or an associate of the buyer, will, subsequent to the purchase or sale, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price."

The provision addresses purchases and sales of goods which are not to be "treated as arms length transactions"[68].

95 Lehane J observed[69]: (i) that it was par (b) of the above definition which came closest to the ordinary concept of an arm's length transaction; but (ii) the circumstance that "there is a commercial relationship between the buyer and the seller which influences price does not necessarily result in the purchase or sale

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67 (1999) 93 FCR 454.

68 (1999) 93 FCR 454 at 458 [17].

69 (1999) 93 FCR 454 at 458 [19].

being other than an arms length transaction in the ordinary sense". Likewise in the present case, with respect to the standard terms governing the relationship described earlier in the reasons between BHP Finance as lender and BHP Reduced Iron as borrower.

96 In its detailed Appeal Statement filed in accordance with the practice under O 52B of the Federal Court Rules, BHP set out the facts subsequently led in its evidence and described earlier in these reasons and in the joint reasons, in support of its contention that there was no "limited recourse debt", and, in particular, that dealings in relation to the debts were at arm's length. The result is that, in the absence of counteracting evidence led by the Commissioner, BHP met in respect of Div 243 the burden of proof upon it pursuant to s 14ZZO of the Administration Act of showing the assessments in question were excessive.

97 The appeals should be dismissed with costs.