HIGH COURT OF AUSTRALIA

13 August 2025

COMMISSIONER OF TAXATION v PEPSICO INC
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[2025] HCA 30

Today, the High Court by majority dismissed six appeals from a decision of the Full Court of the Federal Court of Australia. Two companies resident in the United States of America and forming part of the PepsiCo Group – PepsiCo, Inc ("PepsiCo") and Stokely-Van Camp, Inc ("SVC") – entered into agreements with Schweppes Australia Pty Ltd ("SAPL"), an Australian company, to bottle, sell and distribute beverages within Australia. Relevantly, those agreements provided that PepsiCo or SVC respectively would sell to SAPL, or cause to be sold by one of its subsidiaries, the flavour concentrates necessary for SAPL to manufacture the beverages. The agreements contained either an express or implied licence permitting SAPL to use the intellectual property owned by PepsiCo or SVC necessary to perform its obligations. The agreements did not provide for any payment by SAPL to PepsiCo or SVC of a royalty for the use of that intellectual property. At the relevant times, SAPL bought concentrate from a PepsiCo subsidiary incorporated in Australia, PepsiCo Beverage Singapore Pty Ltd ("PBS"). SAPL made no payments to either PepsiCo or SVC.

The Commissioner of Taxation issued notices of assessment to PepsiCo and SVC for the income years ended 30 June 2018 and 30 June 2019. The notices were issued on the basis that part of the payments made by SAPL to PBS for the supply of concentrate was a royalty paid to or derived by PepsiCo or SVC on which withholding tax was payable under s 128B(2B) of the *Income Tax Assessment Act 1936* (Cth) ("the ITAA 1936") or, in the alternative, effected a diversion of profit which accrued to PepsiCo or SVC for which they were liable to pay diverted profits tax ("DPT") under s 177J of Pt IVA of the ITAA 1936.

PepsiCo and SVC brought proceedings in the Federal Court of Australia challenging those assessments. The primary judge determined that the payments made by SAPL to PBS were, to some extent, consideration for the use of, or the right to use, the relevant trademarks and other intellectual property on which royalty withholding tax was payable and, alternatively, that DPT was payable. A majority of the Full Federal Court allowed the appeals brought by PepsiCo and SVC.

By majority, the High Court dismissed each appeal. On the proper construction of the agreements between SAPL and each of PepsiCo and SVC, the majority held that the payments made by SAPL to PBS were for concentrate only and did not include any component which was a royalty for the use of intellectual property. In any event, the High Court unanimously held that any payment made by SAPL to PBS was not "paid or credited" to or "derived by" PepsiCo or SVC and thus royalty withholding tax was not payable under s 128B(2B) of the ITAA 1936. By majority, the Court also held that each of PepsiCo and SVC did not obtain a tax benefit in connection with a scheme within the meaning of s 177J and was therefore not liable to pay DPT.

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.

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