HIGH COURT OF AUSTRALIA

4 November 2026

COMMISSIONER OF TAXATION v MERCHANT & ANOR
MERCHANT & ANOR v COMMISSIONER OF TAXATION
[2026] HCA 39

Today, the High Court dismissed two appeals (S157 of 2025 and S158 of 2025) and allowed a cross-appeal (in S157 of 2025) from a decision of the Full Court of the Federal Court of Australia. The appeals concerned the application of ss 177D and 177E in Pt IVA of the *Income Tax Assessment Act 1936* (Cth).

In the 2015 income year, entities controlled by Mr Gordon Merchant entered into transactions that generated various tax consequences. First, the Merchant Family Trust ("MFT") sold shares in Billabong International Ltd to the Gordon Merchant Superannuation Fund ("GMSF"), which generated a capital loss of around $56 million ("BBG capital loss"). Second, MFT subsequently sold all of its shares in Plantic Technologies Ltd ("Plantic") to a third-party purchaser, generating a capital gain of around $85 million ("Plantic capital gain"). Prior to the sale of those shares, two companies controlled by Mr Merchant forgave for nil consideration debts owed by Plantic totalling around $54 million. MFT sought to use the BBG capital loss (together with other capital losses) to shelter the Plantic capital gain and thereby reduce the assessable income of its beneficiary, GSM Pty Ltd ("GSM").

The Commissioner of Taxation issued an amended assessment to GSM increasing the tax payable, after exercising the power in s 177F of the *Income Tax Assessment Act* to cancel the BBG capital loss. The Commissioner had relevantly determined under s 177D that one or more persons had entered into or carried out a scheme comprising the sale of the BBG shares for the dominant purpose of MFT obtaining a tax benefit, being the BBG capital loss ("BBG Share Sale Scheme"). The Commissioner also issued an amended assessment to Mr Merchant, and included in his assessable income an amount equal to the debts forgiven as a deemed dividend under s 177E. The Commissioner considered that each debt forgiveness was a scheme having substantially the effect of a scheme by way of or in the nature of dividend stripping for the purposes of s 177E(1)(a)(ii) ("Debt Forgiveness Schemes").

The primary judge found that the dominant purpose of each of Mr Merchant, MFT and GMSF in entering into the BBG Share Sale Scheme was to obtain a tax benefit, being the BBG capital loss. The Full Court, by majority, dismissed an appeal from that decision. The primary judge also found that the Debt Forgiveness Schemes were arrangements which had substantially the effect of a scheme by way of or in the nature of dividend stripping for the purposes of s 177E(1)(a)(ii). The primary judge further considered that s 177E was to be applied on the assumption that the BBG capital loss was available to shelter the Plantic capital gain from taxation. The Full Court, by majority, upheld part of an appeal from that decision.

The High Court unanimously held that the BBG Share Sale Scheme was entered into or carried out for the dominant purpose of obtaining a tax benefit for the purposes of s 177D. There was no other meaningful or realistic commercial objective achieved by the BBG share sale for Mr Merchant, MFT or GMSF. By majority, the High Court also held that the Debt Forgiveness Schemes did not have substantially the effect of a scheme by way of or in the nature of dividend stripping under s 177E(1)(a)(ii).

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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