



HIGH COURT OF AUSTRALIA

Public Information Officer

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COMMISSIONER OF TAXATION v LINTER TEXTILES AUSTRALIA LTD (in liquidation)

The Commissioner of Taxation was right to deny Linter Textiles' claim to be entitled to carry forward losses into later years of income, the High Court of Australia held today.

The Linter group of companies, whose clothing brands included King Gee, Speedo, Pelaco, Exacto, Formfit, Kortex and Stubbies, collapsed in 1990, with a shortfall of assets over liabilities of \$550 million. Linter Group Ltd and its operating companies, associated with Abraham Goldberg, went into receivership. The receivers sold off the businesses and brand names and in 1991 and 1992 liquidators were appointed under winding-up orders issued by the New South Wales Supreme Court. In 1991-92 Linter Textiles had an assessable income of \$10,163,773. It sought to carry forward a loss from 1989-90 of \$10,393,871, along with a deemed loss of \$9,929,676, transferred from its parent company. The losses were not available to offset its assessable income unless criteria in section 80A of the *Income Tax Assessment Act* were satisfied.

In 2000, the Commissioner served a tax assessment notice on Linter Textiles for 1991-1992. Linter Textiles lodged an objection which the Commissioner disallowed. In the Federal Court, Justice Peter Hely allowed an appeal by Linter Textiles. The issue in the appeal was whether or not the orders to wind up both Linter Group and Linter Textiles meant that in 1991-92 Linter Textiles could comply with the requirements of section 80A(1) or (3). If it could not, it could not offset prior losses against its assessable income. Justice Hely held that, pursuant to section 80A(1), the two liquidations had not changed the beneficial ownership of the shares Linter Group held in Linter Textiles, therefore Linter Textiles could offset its losses. The Full Court of the Federal Court dismissed an appeal. The High Court granted the Commissioner leave to appeal.

The Commissioner argued that following the winding-up orders Linter Group no longer continued to beneficially own shares in Linter Textiles and that these shares no longer carried the rights set out in section 80A(1), namely the right to exercise more than half the voting power in the company, the right to receive more than half of any dividends and the right to receive more than half of any capital distribution. The Commissioner argued that the shares did not carry those rights at all times during 1991-92 because their exercise was constrained by the appointment of a liquidator. He argued that winding up Linter Group meant that it did not beneficially own shares in Linter Textiles insofar as Linter Group could use the shares for its own benefit by selling them and applying the proceeds as it thought fit. Beneficial ownership was lost because the liquidator was bound to apply the proceeds according to the formula of distribution between creditors. The High Court rejected these arguments. It held that whether the shares carried the relevant rights at all times depended on whether holders of those shares had the capacity to vote, or to receive dividends or distributions of capital should the occasion arise, and not on whether the exercise of those rights was constrained. The Court also held that even involuntary liquidation has no impact upon the company's beneficial ownership of its assets.

The Commissioner also argued that even if criteria in section 80A(1) were satisfied, section 80A(2) sets out steps whereby section 80A(3) could impose additional requirements over and above those in section 80A(1) for the purpose of determining whether losses are to be taken into account, and that the requirements in section 80A(3) were not satisfied. He submitted that following the winding-up order made on 12 April 1991 the Goldberg family ceased to control, or to be capable of controlling, Linter Textiles continuously throughout 1991-92, as required by section 80A(3). The Court accepted this argument and unanimously allowed the appeal.

- *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.*