Federal Court of Australia

La Mancha Group International B.V. v Commissioner of Taxation [2020] FCA 1799

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| File number: | NSD 1243 of 2020 |
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| Judgment of: | **DAVIES J** |
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| Date of judgment: | 16 December 2020 |
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| Catchwords: | **TAXATION** – choice of laws – cross-border merger of two foreign companies – application for declaration as to surviving company’s rights and liabilities with respect to disappearing company’s Australian taxation liabilities –foreign law applies to determine surviving company’s status – principle of universal succession applied – Commissioner of Taxation proper contradictor despite consent to declaration – declaration made |
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| Legislation: | *Family Law Act 1975* (Cth)  *Foreign Corporations (Application of Laws) Act 1989* (Cth) s 7(3)(a)  *Income Tax Assessment Act 1936* (Cth) s 175A  *Judiciary Act 1903* (Cth) s 39B  *Taxation Administration Act 1953* (Cth) pt IVC, s 14ZZ  Directive (EU) 2017/1132 of the European Council and European Parliament of 14 June 2017 relating to certain aspects of company law, art 131(1)  Dutch Civil Code (Netherlands) arts 2:309 to 2:333b, 3:116  The law dated 10 August 1915 on commercial companies (Luxembourg) art 1021-17 |
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| Cases cited: | *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56; 201 FCR 378  *Clarence City Council v Commonwealth of Australia* [2020] FCAFC 134; 382 ALR 273  *Commissioner of Taxation for the Commonwealth of Australia v Tomaras* [2018] HCA 62; 265 CLR 434  *Federal Commissioner of Taxation v Thomas* [2018] HCA 31; 264 CLR 382  *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; 241 CLR 1  *Laing O’Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASC 49  *McCallum v Commissioner of Taxation* (1997) 75 FCR 458  *National Bank of Greece and Athens SA v Metliss* [1958] AC 509  *Oil Basins Ltd v Commonwealth* [1993] HCA 60; 178 CLR 643  *Sipad Holding ddpo v Popovic* (1995) 61 FCR 205 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Taxation |
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| Number of paragraphs: | 32 |
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| Date of hearing: | 10 December 2020 |
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| Counsel for the Applicant: | Mr J Gleeson SC with Ms F Roughley |
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| Solicitor for the Applicant: | Clayton Utz |
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| Counsel for the First Respondent: | Mr M O’Meara SC with Mr M Cosgrove |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | | NSD 1243 of 2020 |
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| BETWEEN: | LA MANCHA GROUP INTERNATIONAL B.V.  Applicant | |
| AND: | COMMISSIONER OF TAXATION  First Respondent  LA MANCHA AFRICA S.À R.L.  Second Respondent | |

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| order made by: | DAVIES J |
| DATE OF ORDER: | 16 December 2020 |

THE COURT DECLARES THAT:

1. Upon completion of the merger the subject of the Merger Proposal dated 3 November 2020 and approved by the Board of Managers and Directors on 3 November 2020, the second respondent, as surviving company and legal successor of the applicant is:
   1. subject to such liability (as the applicant otherwise had) to income tax under s 5‑5 of the *Income Tax Assessment Act 1997* (Cth) as a result of notices of assessment or notices of amended assessment issued or deemed to be issued to the applicant for the years ended 30 June 2016, 2017, 2018 and 2019 on 13 August 2018, 12 September 2018, 27 September 2018 and/or 9 July 2020 (including as subsequently amended), and is liable to be assessed to any further tax liabilities to which the applicant could otherwise have been assessed under that Act or the *Income Tax Assessment Act 1936* (Cth)*,* together with any interest which accrues on those assessments or other liabilities; and
   2. entitled to exercise all objection and appeal rights pursuant to Part IVC of the *Taxation Administration Act 1953* (Cth) in objection or appeal proceedings currently on foot or to be brought in respect of those and any other assessments issued or to be issued to the applicant or in relation to its asserted liabilities to taxation under the laws of Australia.

THE COURT ORDERS THAT:

1. The applicant pay the costs of the first respondent, such costs to be taxed in default of agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DAVIES J:

# Introduction

1. The applicant (**LMGI**) and the second respondent (**LMA**) are members of the La Mancha Group, a corporate group investing in resources projects globally. LMGI is a private limited company incorporated in the Netherlands and LMA is a private limited liability company incorporated under the laws of Luxembourg. Both companies are wholly owned by La Mancha Precious Metals SA, a public limited company organised under the laws of Luxembourg. As part of a corporate reorganisation of the La Mancha Group, LMGI and LMA are to be merged in accordance with the requirements of the Dutch and Luxembourg cross-border merger laws, pursuant to which the assets and liabilities of LMGI will transfer by universal succession of title to LMA as the surviving company and LMGI, as the disappearing company, will cease to exist. LMGI has extant tax liabilities under Australian taxation laws and a condition precedent to the merger is an order or judgment of an Australian court confirming, in proceedings to which LMGI is a party, that upon completion of the merger, LMA as the surviving company as legal successor of LMGI is entitled to exercise all the objection and appeal rights pursuant to pt IVC of the *Taxation Administration Act 1953* (Cth) (**Taxation Administration Act**) in objection or appeal proceedings currently on foot or to be brought in respect of assessments issued or to be issued to LMGI.
2. By these proceedings, which have been brought under s 39B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), LMGI seeks the following declaratory relief:

A declaration, pursuant to s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and s 21 of the *Federal Court of Australia Act 1976* (Cth) that upon completion of the Merger the subject of the Merger Proposal dated 3 November 2020 and approved by the Board of Managers and Directors on 3 November 2020, the Second Respondent, as Surviving Company and legal successor of the Applicant is:

a. subject to such liability (as the Applicant otherwise had) to income tax under s 5-5 of the *Income Tax Assessment Act 1997* (Cth) as a result of notices of assessment or notices of amended assessment issued or deemed to be issued to the applicant for the years ended 30 June 2016, 2017, 2018 and 2019 on 13 August 2018, 12 September 2018, 27 September 2018 and/or 9 July 2020 (including as subsequently amended), and is liable to be assessed to any further tax liabilities to which the applicant could otherwise have been assessed under that Act or the *Income Tax Assessment Act 1936*, together with any interest which accrues on those assessments or other liabilities; and

b. entitled to exercise all Objection and Appeal rights pursuant to Part IVC of the *Tax Administration Act 1953* (Cth) in objection or appeal proceedings currently on foot or to be brought in respect of those and any other Assessments issued or to be issued to the Applicant or in relation to its asserted liabilities to taxation under the laws of Australia.

1. The Commissioner of Taxation (**Commissioner**) is a respondent to the proceedings and has consented to the grant of the declaration sought. Although the Commissioner has given his consent, whether the declaration sought should be made is a matter for the Court. For the reasons that follow, I am satisfied as to the correctness of the declaration sought and as to the appropriateness of it being made.

# Proposed merger

1. Under the proposed merger, LMGI is referred to as the “Disappearing Company”, LMA is referred to as the “Surviving Company” and together they are referred to as the “Merging Companies”. Recital A of the “Proposal for a Cross Border Merger” (**Merger Proposal**) records as follows:

The Merging Companies wish to enter into a cross-border merger within the meaning of sections 2:309 and 2:333b(1) of the Dutch Civil Code (“**DCC**”) and articles 1021-1 et seq. of the Luxembourg Companies Act on commercial companies dated 10 August 1915, as amended from time to time (the “**Luxembourg** **Companies Act**”), pursuant to which [LMGI] as disappearing company (the “**Disappearing Company**”) will merge with and into [LMA] as surviving company (the “**Surviving Company**”) as a result of which the Disappearing Company will cease to exist and all assets and liabilities of the Disappearing Company will be transferred to the Surviving Company by universal succession of title in accordance with Articles 2:309 and 2:311(1) of the DCC and Article 1021-17 of the Luxembourg Companies Act” (the “**Merger**”).

1. To effect the merger, LMA will, in consideration of the transfer of the assets and liabilities of LMGI valued at EUR 498,307,845 by universal succession of title, increase its share capital by an amount equal to EUR 18,000 fully paid up and allocate the amount of EUR 498,289,345 to the merger premium account of LMA. Upon completion of the merger and publication of the approval of the merger by the shareholder(s) of LMA in the *Recueil Eletronique des Sociétés et Associations*, all issued and outstanding shares in LMGI will lapse and LMGI will cease to exist (Merger Proposal at cls 2.2 and 4).

# Evidence

1. Expert evidence was adduced by LMGI on the content of the foreign laws which govern the proposed merger. The expert evidence on Dutch law with respect to cross‑border mergers was given by Dr Paul de Vries and the expert evidence on Luxembourg law was given by Associate Professor Alain Steichen. Both experts also addressed the relevant laws of the European Union. There was no dispute as to the expertise of Dr de Vries or Associate Professor Steichen and their evidence may be summarised as follows.
2. The governing framework for cross-border mergers involving limited liability companies in the European Union is the European Directive on cross-border mergers (**Tenth Company Directive**), adopted by the European Parliament and European Council on 26 October 2005, as consolidated in Directive (EU) 2017/1132 of the European Council and European Parliament of 14 June 2017 relating to certain aspects of company law (**Consolidated Company Law Directive**). The principal company law statute of Luxembourg implementing the Tenth Company Directive and the further amendments to it reflected in the Consolidated Company Law Directive is the law dated 10 August 1915 on commercial companies, as amended (**Luxembourg Companies Act**). Dutch law implementing the Tenth Company Directive, as consolidated in the Consolidated Company Law Directive, is contained in Title 7, Book 2 of the Dutch Civil Code, in particular arts 2:309 to 2:333b.
3. The foundational concept for cross-border mergers under each of those foreign laws is the principle of universal succession: see art 131(1) of the Consolidated Company Law Directive; art 2:309 of the Dutch Civil Codeand art 1021-17 of the Luxembourg Companies Act*.*
4. The principle of universal succession is expressly referred to in the definition of a “merger” given by art 2:309 of the Dutch Civil Codeas follows (translation from Dr de Vries’ report):

Merger is the legal act of two or more legal persons, whereby one acquires the property, rights and interests and the liabilities of the other by universal succession of titleor whereby a new legal person, formed or incorporated by them jointly by such legal act, acquires their property, rights and interests and the liabilities by universal title.

1. Article 1021-17(1) of the Luxembourg Companies Act reflects the same principle. It provides (translation from Associate Professor Steichen’s report):

(1) The merger shall have the following consequences *ipso iure* and simultaneously:

(1) the universal transfer, both as between the company being acquired and the acquiring company and vis-à-vis third parties, of all of the assets and liabilities of the company being acquired to the acquiring company;

(2) the shareholders of the company being acquired shall become shareholders of the acquiring company;

(3) the company being acquired shall cease to exist;

(4) the cancellation of the shares or corporate units of the company being acquired held by the acquiring company or the company being acquired or by any person acting in his own name but on behalf of either of those companies.

1. Article 131(1) of the Consolidated Company Law Directive describes the consequences of mergers of this kind in similar terms as follows:

(a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;

(b) the members of the company being acquired shall become members of the acquiring company;

(c) the company being acquired shall cease to exist.

1. As Associate Professor Steichen and Dr de Vries both explained, the concept of universal succession under European Union law is a concept that entails automatic transfer of the assets and liabilities of the absorbed company, with some limited exceptions based on both legal and practical considerations. Generally stated, these exceptions are: (1) industrial and intellectual property rights and certain rights relating to movable and immovable property (all of which require certain further formalities such as notice and registration to be complied with to complete the transfer); (2) circumstances where the personal nature of the right involved precludes automatic transfer, such as personal services, government licences or grants, or directorships, partnerships, nomination and appointment rights; and (3) contractual obligations which are either expressly or impliedly not transferrable by universal succession.
2. Dr de Vries’ evidence was that under Dutch law, in the case of a transfer under universal succession of title, all property, rights, interests and liabilities will transfer in a single act without any requirement to follow specific transfer rules for each single item separately. That includes the right to commence litigation, or to continue litigation initiated by the company that has been absorbed and no longer exists. Associate Professor Steichen’s evidence was that under Luxembourg law, the position with respect to assets is materially the same. A merger entails the automatic transfer of shareholdings without amendment to the corporate register, all rights of the disappearing company as creditor against debtors, including security rights and judgment creditor rights, all principal claims of the disappearing company – including under a mortgage over real estate property – and associated claims for interest, yield, indemnities, guarantees and security interests (subject only to a possible exception in the case of suretyships), rights in respect of assets transferred, such as the right to sue in respect of them and enforcing legal proceedings, and rights attaching to the asset.
3. The expert evidence about the transfer of liabilities was very similar. In particular, Dr de Vries stated that it is generally held that liability arising from tax liabilities transfers by way of universal succession. Dr de Vries noted this is to prevent abuse and avoidance of such liability by way of merger. Associate Professor Steichen’s evidence was that under Luxembourg law, universal succession entails transfer of “all the liabilities of the Disappearing ForeignCo”, whether they have a contractual or statutory basis, whether due or not yet payable and “whether they are owed to a private (within the corporate purpose) or public creditor (social security contributions, taxes or other public duties)”. There is no requirement for novation, substitution of debtor or consent of creditor required for the substitution of the acquiring entity, as the debtor stands in the shoes of the disappearing entity. Associate Professor Steichen was particularly emphatic as to the totality of liabilities transferred and that such transfer necessarily also entails the transfer of all rights attaching to such liabilities. He stated:

[All such liabilities] are all to be assumed automatically by the Acquiring LuxCo, as well as any accessory rights and obligations relating thereto. In particular the right to be sued or be defendant in court proceedings will automatically be vested with the Acquiring LuxCo, who may thus be held liable for faults or defaults of the Disappearing ForeignCo in respect of the latter’s obligations. In any event, no liabilityor accessory right or obligation attaching thereto may be left behind given that the Disappearing ForeignCo shall, also automatically and upon the Merger becoming effective, cease to exist…

1. Dr de Vries likewise explained that a successor under universal succession of title will be entitled to exercise the same rights and obligations as the original owner. Article 3:116 of the Dutch Civil Code stipulates that “[a] person who succeeds another by universal title succeeds to the other’s rights of possession and detention with all the characteristics and defects thereof” (translation from Dr de Vries’ report).
2. Following a request from the Commissioner for clarification, both experts were asked to clarify whether, in referring to the transfer of tax liabilities under the universal succession principle, they were including both domestic tax liabilities and those arising under foreign law. Both experts confirmed that tax liabilities passed under the universal succession principle, regardless of whether they arose under domestic law or foreign law.
3. The following points can be taken from the expert evidence. Under European law, Luxembourg law and Dutch law, pursuant to the principle of universal succession:
   1. all liabilities of LMGI to tax, including under foreign law (that is, the relevant Australian tax acts), will transfer to LMA by operation of law pursuant to the principle of universal succession upon completion of the merger, as will the rights and obligations of LMGI in respect of such tax liabilities;
   2. upon the completion of the merger, LMGI will cease to exist; and
   3. from the effective date of the merger, LMA will stand in the shoes of LMGI.

# LMGI’s Australian tax liabilities

1. LMGI has unpaid Australian tax liabilities arising from assessments for the income years ended 30 June 2016 to 30 June 2019, together with shortfall interest charge and general interest charge in the total amount of $90,083,572.47 as at 4 December 2020. LMGI objected to those assessments, which were disallowed by objection decisions made in November 2020. On 2 December 2020, LMGI commenced proceedings under s 14ZZ of the Taxation Administration Actappealing from those objection decisions. LMGI has not yet lodged income tax returns for the income years ended 30 June 2020 or 30 June 2021 (they are not yet due to be lodged). Therefore, LMGI may have unassessed tax liabilities for those income years. The legal question raised by this application is whether, after the merger and as a matter of Australian law, LMA, as the surviving entity, would be subject to the tax liabilities of LMGI and entitled to exercise the relevant statutory rights under pt IVC of the Taxation Administration Actin respect of assessments which have issued to LMGI and any future assessments issued in respect of tax liabilities of LMGI which accrued pre-merger.
2. The disputed tax liabilities result from several assessments issued by, or deemed to have been issued by, the Commissioner to LMGI for the financial years ending 2016, 2017, 2018 and 2019 relating to transactions by LMGI in selling its shares in an Australian company named Evolution Mining Limited (**Evolution**). The Commissioner contends that the sale of those shares in Evolution attracts capital gains tax. LMGI disputes that the sale of the Evolution shares attracts any liability to capital gains tax, and if it does, disputes the quantum of the tax to which it has been assessed. Pending resolution of that dispute, security agreements have been entered into between the Commissioner and LMGI, and La Mancha Holdings S.a.r.l. (the ultimate holding company) has given the Commissioner a deed of guarantee in respect of the amounts assessed.
3. As mentioned, the proposed merger is subject to a condition precedent in the following form:

In addition to the above conditions, the Merger shall only be completed upon acknowledgement of receipt by the Merging Companies of an order or Judgment of an Australian Court (Federal Court of Australia, Full Court of the Federal Court of Australia, or the High Court of Australia) confirming, in proceedings to which the Disappearing Company is party, that upon completion of the Merger, the Surviving Company as legal successor of the Disappearing Company is entitled to exercise all Objection and Appeal rights pursuant to Part IVC of the Tax Administration Act 1953 (Cth) [sic] in objection or appeal proceedings currently on foot or to be brought in respect of Assessments issued or to be issued to the Disappearing Company or in relation to its asserted liabilities to taxation under the laws of Australia (or makes orders or gives reasons to the same or similar effect as the preceding).

In effect, the merger can only complete if LMGI and LMA obtain an order or judgment of this Court (or an appeal court from the first instance decision) confirming that LMA, as the surviving entity after the merger, takes LMGI’s statutory objection and appeal rights under pt IVC of the Taxation Administration Act in respect of the assessments currently disputed and any future assessments relating to LMGI. The application for declaratory relief to this Court is made to satisfy the condition precedent.

# Consideration

1. Where a question arises under Australian law as to the status of foreign entity, Australian common law choice of law rules look to the law of incorporation of the entity to determine questions of the entity’s status: *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 (***Metliss***) at 525 per Viscount Simonds, 529 per Lord Tucker and 531 per Lord Keith; *Sipad Holding ddpo v Popovic* (1995) 61 FCR 205 (***Sipad***) at 213; *Laing O’Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASC 49 (***Laing***) at [26]–[36]. In *Metliss*, the National Bank of Greece had been created under the law of Greece. By a Greek decree, the bank was dissolved and, by the same decree, amalgamated with another bank into a new banking corporation under the name of “National Bank of Greece and Athens”. The Greek decree provided that the new bank was the “universal successor” to the rights and obligations of the former banks. The House of Lords held that, for the purposes of determining who was the nominated guarantor of certain bonds, the question was not one of contract (which was governed by English law) but one as to the status of the new bank. The House of Lords rejected the contention that “status” was “confined to the existence, powers and dissolution of the new corporation”. It held that the question of the transfer of liabilities from the old bank to the new was a matter of, or pertaining to, the new bank’s “status”. Since English law looks to the law of incorporation for matters of status, and because Greek law provided that the new bank was the universal successor to the old bank, the House of Lords held that the new bank could be sued for the dissolved National Bank of Greece’s obligations as guarantor of certain bonds, although the question of whether the bonds were enforceable against the new bank was governed by English law. *Sipad* was a case involving the construction and application of Australian corporations laws dealing with membership of a company and rights of members in circumstances where foreign law had operated to transfer the assets and liabilities of former entities (including their shareholding) to new entities by universal succession. Lehane J, after referring to *Metliss* and“applying [Australia’s] rules of private international law” gave recognition and effect to the principle of universal succession, which applied under the foreign law, in determining the construction and application of Australian corporations laws to the successor entity. In *Laing* the Supreme Court of Western Australia concluded that the effect of a merger under Korean law, which (in substance) provided for one Samsung entity to be merged into another and for the surviving entity to be the universal successor of the rights and liabilities of the old Samsung entity, was that performance bonds issued by a bank in favour of the old Samsung entity and which were governed by the law of Western Australia were enforceable by the new Samsung entity by reason that the question of the status of the new Samsung entity was governed by the law of Korea, and that law provided, in effect, that it stood in the shoes of the old Samsung entity. The common law principle finds further expression in s 7(3)(a) of the *Foreign Corporations (Application of Laws) Act 1989* (Cth) (**Foreign Corporations Act**), which provides to the effect that any question relating to the status of a foreign corporation (including its identity as a legal entity and its legal capacity and powers) is to be determined by reference to “the law applied by the people in the place in which the foreign corporation was incorporated”.
2. As *Metliss, Sipad* and *Laing* all demonstrate, the determination of the “status” of LMA will include the question as to the legal consequences of the merger with respect to the tax debts of LMGI and any future tax liabilities pursuant to the principles of universal succession. In addressing this question in the present case, it is unnecessary to determine whether it is the law of the surviving entity which will determine whether the surviving entity has, post‑merger, the status of universal successor of the obligations and rights (including taxation obligations and objection appeal rights in respect of foreign tax liabilities) of the disappearing entity, or whether it is the law of the original entity (which would be Dutch law). This is because Luxembourg law and Dutch law apply the same principle of universal succession to cross-border mergers and the laws have the same legal consequences. Thus, through either or both of the common law principles of private international law or s 7(3)(a) of the Foreign Corporations Act, Australian law will recognise and give effect to the Dutch and/or Luxembourg laws governing cross-border mergers, which draw on the principle of universal succession, as laws which relate to the status, including legal identity, of LMGI and LMA.
3. In accordance with these principles, following completion of the merger, Australian law will recognise LMA as possessing the necessary status or identity to enable it:
   1. to be subjected to the liabilities and obligations that LMGI possessed prior to the merger or to which it would have become subjected but for the merger; and
   2. to exercise the rights and privileges that LMGI possessed prior to the merger or would have been able to exercise but for the merger.
4. In consequence, the tax liabilities of LMGI will be assumed by LMA as a result of the merger. Moreover, LMA, as the “taxpayer” under s 175A of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**), will be entitled to object against assessments which have been issued to LMGI, or which are issued to LMA in its place, and will be “the person” entitled to appeal against objection decisions in relation to objections from those assessments under pt IVC of the Taxation Administration Act, or to continue those appeals. Although those liabilities and obligations (on the one hand) and rights and capacities (on the other) arise under Australian law and are governed by Australian law, Australian law will recognise the operation of Dutch and/or Luxembourg law following the merger as having clothed LMA with the necessary attributes or identity to subject it to those obligations and liabilities and to enable it to exercise those rights and capacities for the purposes of Australia’s tax acts. I accordingly accept as correct the contentions of LMGI and of the Commissioner that LMA will stand in the shoes of LMGI for the purposes of the application of Australia’s taxation laws.
5. The Court was taken to *McCallum v Commissioner of Taxation* (1997) 75 FCR 458 (***McCallum***) and *Commissioner of Taxation for the Commonwealth of Australia v Tomaras* [2018] HCA 62; 265 CLR 434 (***Tomaras***) as to the meaning of “the person” and “a person” in pt IVC of the Taxation Administration Act. Both cases can be distinguished from the present case. *McCallum* concerned the construction and application of pt IVC of the Taxation Administration Act in the circumstance of a bankrupt who had objected to an assessment made by the Commissioner before he was made bankrupt. After the objection was disallowed, the bankrupt, in reliance on s 14ZZ of the Taxation Administration Act, applied to the Administrative Appeals Tribunal for review of the Commissioner’s decision to disallow the objection. The Full Court (Whitlam and Lehane JJ, Hill J dissenting) held that the bankrupt was “the person” for the purposes of s 14ZZ of the Taxation Administration Act with the statutory right to bring a review but, by operation of the bankruptcy laws, he lost his standing to bring that application upon becoming bankrupt. In *Tomaras*, in family law proceedings between Mr and Mrs Tomaras, the question arose as to whether the Court had the power to make an order under the *Family Law Act 1975* (Cth) (**Family Law Act**) binding on the Commissioner, substituting one spouse as the debtor of a tax debt owed by the other. The case turned on the Court’s powers under the Family Law Act, not upon consideration as to whether the statutory rights under pt IVC of the Taxation Administration Act applied to a person who was not the taxpayer. Both those cases concerned very different questions that do not arise in the present case and do not stand as authority against the proposition that, in relation to the objection rights under s 175A of the ITAA 1936 and review or appeal rights under pt IVC of the Taxation Administration Act, LMA, as the surviving company, will, by universal succession, stand in LMGI’s shoes and hold such rights upon completion of the merger.
6. The next matter for consideration is the Court’s jurisdiction to make the declaration sought and whether this is an appropriate case to exercise the discretion to make that declaration. There is no doubting the Court’s jurisdiction, as the question raised by the declaration sought is a matter arising under laws made by Parliament within the meaning of s 39B(1A)(c) of the Judiciary Act: namely, to which entity do the Australian tax laws imposing liabilities to tax and correlative objection and appeal rights apply on completion of the proposed merger? The matter is also not a theoretical question for determination and the declaration is sought by a person with a real interest to do so. Furthermore, the Commissioner is both a proper and necessary party as respondent to the application. The Commissioner has a true interest in opposing the declaration sought and is therefore a proper contradictor: cf *Federal Commissioner of Taxation v Thomas* [2018] HCA 31; 264 CLR 382. It is not necessary that the declaration sought actually be contested at the final hearing, merely that there be a party who has a true interest to oppose the declaratory relief and, in the present case, the Court has had the benefit of a contradictor actively participating in the proceedings and putting forward detailed submissions, albeit the Commissioner ultimately has agreed with the terms of the declaration sought: *Oil Basins Ltd v Commonwealth* [1993] HCA 60; 178 CLR 643 at 649 per Dawson J; *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56; 201 FCR 378 at 387 [30]; *Clarence City Council v Commonwealth of Australia* [2020] FCAFC 134; 382 ALR 273 at 314 [133]. LMA, the other entity whose rights and liabilities are also directly affected by the relief sought is also a respondent to the proceeding: *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; 241 CLR 1 at 46 [131]. Finally, the declaration also has obvious utility in that it serves to put beyond doubt the effect of the merger in relation to the application and operation of Australian tax laws with respect to the extant and future tax liabilities (if any) of LMGI.
7. Three other matters should be mentioned which give confidence to the Court about the appropriateness of making the declaration sought.
8. First, the Court has before it evidence as to the rationale for the merger. Mr Karim-Michel Nasr, a director of both LMGI and LMA, and also of their shared parent company La Mancha Precious Metals SA and the CEO of the La Mancha Group, explained that since 2019, the La Mancha Group has been attempting to rationalise and consolidate its corporate structure, including for cost reduction purposes. LMGI is a special purpose vehicle that was incorporated in 2012 to hold La Mancha Group’s investment in Evolution and was structured as a stand‑alone company because of requirements of La Mancha Group’s former financing and loan arrangements. Earlier in 2020, LMGI sold the last of its remaining shares in Evolution (the sale of which has given rise to the disputed tax assessments and potential future tax liabilities in question) and has now fully divested its holdings in Evolution to third parties, repaid the relevant loans and is no longer needed as part of the La Mancha Group as it serves no further investment purpose. It is estimated that the proposed merger, if completed, will save the La Mancha Group approximately EUR 840,000 per annum in operating costs, not including additional service costs incurred by the parent company under the current structure in respect of LMGI, but not currently charged to LMGI. Based on that evidence, I accept that the purpose of the merger is legitimate and consistent with good corporate governance.
9. Secondly, it was brought to the Court’s attention that there is currently a proposal before the Dutch Parliament to impose a tax colloquially referred to as an “exit tax” on cross-border mergers (and other kinds of transactions) which lead to a corporate exit from the Netherlands, or an exiting from the Netherlands of the revenue or profits of a corporation by way of share capital distribution to members in specified other jurisdictions. In its present form the bill makes provision for such a tax, if made law, to apply retrospectively from 12.00 pm on 18 September 2020 and thus it appears that the timing of the proposed merger would not avoid the imposition of the proposed exit tax in respect of it, if the bill is passed in its present form, by reason of its retrospective effect (and if the law otherwise applies to the merger).
10. Thirdly, aside from the terms of the declaration in sub-para (a), the parties have entered into security arrangements and a deed of acknowledgement (to which La Mancha HoldingS.a.r.l is also a party) in protection of the parties’ respective interests in relation to the tax liabilities.
11. Accordingly I have concluded that the declaration sought should be made.

# Costs

1. The Commissioner seeks his costs of the application on the basis that LMGI sought a declaration binding on the Commissioner as a condition of the corporate reorganisation which the La Mancha Group proposed to implement for their own commercial reasons. It was submitted that this has had the consequence that the Commissioner has been required to engage with the matter and incur costs both to protect his own interests and to discharge his duty to assist the Court, which he would otherwise have had to bear. The submission put for LMGI in this regard was that the Court in the exercise of its discretion to award costs should also take into account that the declaration will likely have utility beyond the interests of the La Mancha Group and the declaratory relief is one of wider significance to the revenue and the Commissioner because it will establish how the law operates for Australian tax law purposes with respect to cross-border mergers of this kind. The wider public importance of the subject matter of the declaration can be recognised, but I do not think it warrants the Commissioner being deprived of his costs. As stated, the Commissioner was both a proper and necessary party to the application, both because it was sought to have the declaration binding on the Commissioner and because the Commissioner has a true interest to oppose the declaration sought and is an appropriate contradictor. He is entitled to his costs in responding to the application and there will be an order that the applicant pay the costs of the first respondent.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Davies. |

Associate:

Dated: 16 December 2020