Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

04 JUNE 2021

MEDIA RELEASE

FRUCOR SUNTORY NEW ZEALAND LTD v COMMISSIONER OF INLAND REVENUE

(SC 81/2020)

COMMISSIONER OF INLAND REVENUE v FRUCOR SUNTORY NEW ZEALAND LTD

(SC 92/2020)

CASE HISTORY SYNOPSIS

This synopsis is provided to assist in understanding the history of the case and the issues to be heard by the Court. It does not represent the views of the panel that will hear the appeal in the Supreme Court. Direct links to the judgment of the High Court, Court of Appeal and the Supreme Court leave decisions are included at the end of the synopsis.

Frucor Suntory New Zealand (Frucor) is a wholly-owned subsidiary of the Danone Group companies. It was incorporated to acquire all of the shares in the Frucor Beverages Group. It was initially funded by two of the Danone group companies with a mixture of debt and equity. In March 2003, there was a refinancing through Deutsche Bank. Frucor used the funds received to repay the debt and redeem part of the equity.

The refinancing took the form of a convertible note issued by Frucor to Deutsche Bank redeemable in five years' time at Deutsche Bank's election by the issue of non-voting shares in Frucor. A portion of the funds provided by Deutsche Bank came from the Deutsche Bank Treasury. The remainder came via a forward purchase by a Danone company of the shares in Frucor after the exercise of the option under the convertible note. Interest of $66 million was paid by Frucor over the five-year term of the convertible note.

The Commissioner of Inland Revenue contends that the refinancing was a tax avoidance arrangement and that the interest deduction should be limited to that paid on the funds sourced from the Deutsche Bank Treasury. Frucor argues that the

refinancing was not a tax avoidance arrangement and that it was entitled to a deduction for all of the interest paid on the convertible note.

The High Court found that the refinancing arrangement was not a tax avoidance arrangement. The Judge further concluded that, in the event he was wrong, shortfall penalties should not be imposed on Frucor.

On appeal, the Court of Appeal disagreed with the High Court, concluding that the refinancing arrangement was tax avoidance. However, the Court of Appeal agreed with the High Court that shortfall penalties should not be imposed.

The Supreme Court granted Frucor leave to appeal on the ground of whether the Court of Appeal was correct to allow the appeal. The Court also granted the Commissioner leave to appeal on the issue of whether the Court of Appeal was correct to hold that shortfall penalties do not apply.

This hearing can be viewed remotely by members of the public. Courtroom restrictions apply to remote viewing. No recording is permitted. Email your request with your name and phone number to the Supreme Court Registry:
supremecourt@justice.govt.nz

Contact person:
Sue Leaupepe, Supreme Court Registrar (04) 914 3613

High Court decision: [2018] NZHC 2860 (5 November 2018)
Court of Appeal decision: [2020] NZCA 383 (3 September 2020)
Supreme Court leave decision: [2020] NZSC 150 (18 December 2020)