

**THE COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA v THOMAS (B60/2017)**
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COMMONWEALTH OF AUSTRALIA v MARTIN ANDREW PTY
LTD (B61/2017)**
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Court appealed from: Full Court of the Federal Court of Australia
[2017] FCAFC 57

Date of judgment: 12 April 2017

Special leave granted: 20 October 2017

Thomas Nominees Pty Ltd (“TNPL”) was the trustee of a trust of which Mr Martin Thomas and the company Martin Andrew Pty Ltd (“MAPL”) were beneficiaries. Mr Thomas and his mother were the directors and shareholders of TNPL, while Mr Thomas was the sole director and shareholder of MAPL.

In the income years ending 30 June 2006, 2007, 2008 and 2009, TNPL’s income included franked dividends. In each of those years, TNPL made two resolutions that purported to apply the trust’s net income in certain ways for the benefit of Mr Thomas and MAPL (collectively, “the Resolutions”). An assumption underlying the Resolutions was that the taxation benefits of franking credits could be treated as a category of income separately (severally and disproportionately) from dividend income in any manner TNPL might determine. Income tax returns lodged for the trust included franking credit sums ostensibly distributed (by the Resolutions) to Mr Thomas and to MAPL. For the 2008 income year, for example, most of the net income of \$142,651 was distributed to MAPL and \$50 was distributed to Mr Thomas, while franking credits were distributed in the amounts of \$42,780 to MAPL and \$1,030,839 to Mr Thomas.

Initial assessments for tax issued by the appellant (“the Commissioner”) led to Mr Thomas receiving substantial refunds on account of offsets for franking credits. Later however the Commissioner commenced an audit, after doubting that the Resolutions had properly distributed all of the trust’s net income to the beneficiaries (Mr Thomas and MAPL) with a corresponding proportionate allocation of franking credit benefits.

TNPL then commenced Supreme Court proceedings under s 96 of the *Trusts Act* 1973 (Qld) for declarations as to the proper interpretation (and, if necessary, rectification) of the Resolutions. (Both Mr Thomas and MAPL were inactive parties and the Commissioner declined to seek to be joined as a party to those proceedings.) On 11 November 2010 Justice Applegarth held that, in view of the trust deed and relevant taxation legislation, the Resolutions enabled TNPL to treat the franking credits as part of the trust’s net income and to distribute

them to the beneficiaries in the manner that it did. Declarations made by Justice Applegarth the next day included, at paragraph 1(b) (“the Declaration”), that the Resolutions were effective to allocate the franking credits and the benefits thereof to both Mr Thomas and MAPL and to confer on those beneficiaries corresponding vested and indefeasible interests. The Declaration also stated that the Resolutions were effective in distributing all of the trust’s distributable income.

The Commissioner later issued amended notices of assessment to the Taxpayers. After objections to those assessments were disallowed by the Commissioner, the Taxpayers appealed to the Federal Court. Justice Greenwood (in determining four appeals involving various issues) held that the amended assessments should stand. His Honour held that the allocation of franking credits (and the subsequent use of them for tax offsets) independently of the distribution of corresponding franked dividends was impermissible, as a nexus between such allocation and distribution was mandated by s 207-55 of the *Income Tax Assessment Act* 1997 (Cth) (“the Act”). This was after his Honour had held that the Declaration and underlying findings made by Justice Applegarth did not bind the Commissioner in relation to the operation of Commonwealth taxation law.

The Full Court of the Federal Court (Dowsett, Perram and Pagone JJ) unanimously allowed an appeal by Mr Thomas and an appeal by MAPL (the latter in relation to one income year) and dismissed two appeals by the Commissioner. The Full Court held that, although the Commissioner was not bound by Justice Applegarth’s interpretation of Div 207 of the Act, the rights of the beneficiaries as against the Commissioner under Div 207 depended wholly upon the rights as between the trustee and the beneficiaries by whatever had been achieved by the Resolutions. Their Honours held that the Declaration had conclusively determined the latter rights and therefore also the former. The Full Court then set aside the Commissioner’s decisions on Mr Thomas’ and MAPL’s objections and ordered the Commissioner to redetermine the trust’s net income.

In each appeal, the grounds of appeal include:

- The Full Court erred in finding that it was bound by the decision of this Court in *Executor Trustee And Agency Company of South Australia Limited v The Deputy Federal Commissioner of Taxes (South Australia)* (1939) 62 CLR 545 to conclude that paragraph 1(b)(iii) of declarations made by the Queensland Supreme Court in *Thomas Nominees Pty Ltd v Thomas* (2010) 80 ATR 828 determined conclusively as against the Commissioner the existence of the alleged rights referred to in the declarations.

In each appeal, the respondent has filed a notice of contention and in B60/2017 Mr Thomas has filed a notice of cross-appeal. In B60/2017 and B61/2017 the respondents (being Mr Thomas and MAPL respectively) have each filed a notice of a constitutional matter. The Attorneys-General of the Commonwealth and the State of Queensland are intervening in both B60/2017 and B61/2017.