

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO B 63 OF 2017

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF
AUSTRALIA
Appellant

MARTIN ANDREW THOMAS
Respondent

APPELLANT'S SUBMISSIONS IN REPLY
(THOMAS PENALTY)

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Filed on behalf of the Appellant: The Commissioner of
Taxation of the Commonwealth of Australia

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551 of the *Judiciary Act 1903*

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Part I: Certification

1. These submissions are in a form suitable for publication on the Internet.¹

Part II: Argument

2. **Disposition of this appeal.** The Full Federal Court did not reach this matter or consider the appeal because, as noted, of the way in which it dealt with the four proceedings. The questions raised by Mr Thomas's Notice of Contention filed in this appeal are not apt to be resolved by this Court. Those questions which concern the appropriateness of the imposition of administrative penalties on Mr Thomas (leaving to one side the question Mr Thomas raises as to their validity, which is considered below at [4]) would require consideration of the way in which the law which Greenwood J discussed at FCA [553]-[583], might apply to:

- (a) evidence of the kind summarised by Greenwood J, for instance, at FCA [242]-[321]; and
- (b) facts of the kind described at FCA [536]-[547].

3. In particular, this Court would, if it proceeded to consider the appropriateness of the administrative penalties imposed upon Mr Thomas, arguably need to consider the basis upon which Mr Thomas sought to justify the position reflected in his income tax returns in each of the Income Years, recalling that:

- (a) in his Appeal Statement dated 20 September 2012, Mr Thomas:
 - (i) noted that the parties had joined issue on whether the franking credits are required under Division 207 to be allocated in the same proportion as the s 95 net income: at [17];
 - (ii) expressly adopted the analysis of the Queensland Supreme Court in *Thomas Nominees Pty Ltd v Thomas* at paragraphs 41ff on the issue: at [18];²

¹ Capitalised terms used in these reply submissions are as defined in the Commissioner's principal submissions of 24 November 2017 filed in the Thomas Primary Tax appeal, B 60. For convenience, the submissions of the Commissioner and the Respondent in B60 are treated as the principal submissions and referred to as **AS B60** and **RS B60** respectively. Reference to paragraphs this appeal are denoted by B 63, to the 2009 Year by B62 and to MAPL Primary Tax by B61, where AS refers to the Commissioner's submissions and RS refers to the Respondent's submissions.

² Paragraph 41 of that decision is in the following terms: "The applicant submits that an answer to the question of whether a differential allocation is permitted, such that the dual resolutions were effective to distribute the franking credits as intended, is to be found in an example given in s 207-35 and in the general law. It submits that under Division 207 franking credits are allocated to those beneficiaries to whom the trustee (or the relevant trust deed) specifically allocates them."

(iii) stated that Division 207 follows the trust law allocation of franking credits among the Beneficiaries, whatever their percentage shares of s 95 net income and whether or not the gross dividend income is depleted by trust expenses: at [19];

(iv) stated that “*The trustee allocated the net income that gave rise to franking credits, i.e., the franked distributions to the applicant and Martin Andrew Pty Ltd as per its resolutions*”: at [20]; and

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(b) in the Second Further Amended Appeal Statement dated 23 August 2013, Mr Thomas:

(i) substantially repeated paragraphs 17 to 20 of the 21 September 2012 Appeal Statement: at [36]-[38] and [42];

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(ii) added that, even though s 97 of the 1936 Act takes a proportionate approach to the distribution of net income, s 207-35 is expressed to be an exception to Division 6; and that “*the trust deed can deal differently with franked distributions so as to direct the benefit of the franking credit amounts to one beneficiary to the exclusion of others, or in different proportions among the beneficiaries*”: [39]; and

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(iii) said that the consequences of the Trustee’s allocation of the net income giving rise to franking credits were *as returned by the beneficiaries and as originally assessed* (i.e., as per the Deemed Assessments, reflected in the figures taken from the Bifurcated Returns, shown in the Commissioner’s submissions at AS B60 [15]): [42].

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4. **Response to Notice of Contention.** The same primary issue arises in this and each of the other appeals, as set out in the Commissioner’s submissions at AS B60 [2]. That is because of the way in which the Full Federal Court addressed the four proceedings.

5. Specifically, Pagone J treated the several proceedings and the reasons for the final orders as turning on the one issue, observing that “the principal issue in these appeals is whether the taxpayers are entitled to franking credits in the relevant income tax years. Other issues concerning penalty assessments also arise if the taxpayers are unsuccessful on the principal issue.”³

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³ FCAFC [7].

6. Consequently, it cannot be said that the Full Federal Court, implicitly or otherwise, agreed with or approved of Greenwood J's conclusion that Mr Thomas was not liable to administrative penalties for the reasons he gave at FCA [582]-[586].⁴
7. On any remitter to the Full Federal Court, the Commissioner will contend that his assessments of Mr Thomas to administrative penalties were not invalid, for the reasons that follow.
- 10 8. Mr Thomas contends that, if the Commissioner issues two penalty assessments on alternative bases, one must be incorrect; and that it follows that this is an improper exercise of the assessing power on the Commissioner's part such that both assessments are vitiated by error.⁵
- 20 9. However, the administrative penalty assessment process is not automatic, as Mr Thomas observes. ⁶ Rather, like the primary tax assessment process described in the Commissioner's submissions in at AS B60 [53]-[59], it entails consideration of the application of law to facts and the preparation of reasons why any penalty ought be imposed.⁷
- 30 10. It is permissible to issue assessments to primary tax to more than one taxpayer on the same income.⁸ If one of those assessments is correct, it does not follow that there is an error in issuing that assessment merely because another (arguably incorrect) assessment has been issued in the alternative.
- 40 11. Given the similarity in the nature of primary tax and penalty assessment processes, which the decision in *Jolly* illustrates, there is no relevant distinction of principle to be drawn between the two kinds of assessment. Greenwood J was thus correct to hold⁹ that the same position prevails for penalty assessments as for assessments to primary tax.

⁴ C.f., Mr Thomas's submissions at RS B63 [12].

⁵ RS B63 [16]-[17].

⁶ See, e.g., his submissions at RS B63 [20].

⁷ See, e.g., *Jolly v Federal Commissioner of Taxation* [1935] HCA 21; (1935) 53 CLR 206 (*Jolly*).

⁸ *Richardson v Federal Commissioner of Taxation* [1932] HCA 67; (1932) 48 CLR 192 and *Deputy Federal Commissioner of Taxation v Richard Walter* [1995] HCA 23; (1995) 183 CLR 168.

⁹ At FCA [577]-[579].

12. If the Commissioner succeeds on grounds at [2] or [3] of each of his Notices of Appeal, the matter ought be remitted to the Full Federal Court.

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