IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B19 of 2015

BETWEEN:

COMMISSIONER OF TAXATION

Appellant

AND

AUSTRALIAN BUILDING SYSTEMS PTY LTD
ACN 094 238 678 (IN LIQUIDATION)

Respondent

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B20 of 2015

BETWEEN:

COMMISSIONER OF TAXATION

Appellant

AND

GINETTE DAWN MULLER AND JOANNE EMILY DUNN AS LIQUIDATORS OF AUSTRALIAN BUILDING SYSTEMS PTY LTD ACN 094 238 678 (IN LIQUIDATION)

Respondent

APPELLANT'S REPLY

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Part I: Internet

1. The appellant (**Commissioner**) certifies that these submissions are in a form suitable for publication on the internet.

Part II: Reply

2. The Commissioner replies to the Respondents' Submissions dated 19 June 2015 (**RS**) as follows.

The certainty proposition (RS[13]-[31]):

3. The submissions at RS[13]–[31] terminate in the proposition that s254(1)(d) of the *Income Tax Assessment Act 1936* (**1936 Act**) permits and obliges an agent or trustee to retain, and only retain, the *precise* amount of tax that is or will become due in respect of the income, profits or gains (**IPG**) derived in their representative capacity. Therefore, the submission continues, the retention obligation in s254(1)(d) can only arise once an assessment has issued which defines with certainty the tax due in respect of the IPG.

4. That construction of s254(1)(d) is supported by neither the text or context of s254(1)(d). The submission neglects two features of the text of s254(1)(d). First, the retention obligation and authorization is one to "retain" – ie., to "keep" or "hold back" – from 'time to time" and not to "hold at all times".[1] It is not a singular obligation and authorization, but an ambulatory one arising as and when the agent or trustee is called on to distribute moneys over to the beneficiary or principal. It is at that point that the agent or trustee must determine how much (s)he or it should keep or hold back to comply with s254(1)(d).

5. Second, the content of what can and must be retained on those occasions is supplied by a concept of sufficiency; ie., "so much *as is sufficient* to pay tax which is or will become due in respect of" the IPG (emphasis added). The concept of sufficiency does not necessitate *precision*, but rather imports a lesser requirement of *adequacy for a purpose*. This is disclosed by the first three definitions accorded to the word "sufficient" in the *Oxford English Dictionary*: "of a quantity, extent, or scope adequate to a certain purpose or object"; "to furnish means or material for, to supply, to provide for the performance of a thing"; and, "to provide for the need or accommodation of, to satisfy". Commonly, the retention of an amount or thing sufficient for a purpose will precede the occasion requiring the use of the amount or thing for that purpose. Thus, ascertaining what will be sufficient and what needs to be kept back for that future occasion will often be necessarily imprecise. That the concept of sufficiency does not require an exact correspondence between what is retained and the tax which becomes due was the point being made by Latham CJ in *Federal Commissioner of Taxation v Official Liquidator of EO Farley Limited (in liq)* (1940) 63 CLR 278 at 288 (referred to at RS[29]-[31])[2] and by Allsop CJ (in the context of foreign currency) in *RCF IV* at [11] (referred to RS[23]-[25]).

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[1] See in relation to s255(1)(b), *Federal Commissioner of Taxation v Resource Capital Fund IV LP* (2013) 215 FCR 1 (***RCF IV***) at [8] per Allsop CJ. cf., the submissions at RS[27].

[2] The statutory language in *Farley* was not identical (the amount to be set aside was that "as appears to the Commissioner to be sufficient to provide for any tax that then is or will thereafter become payable"), but the effect is the same.

6. In the light of these two matters, much of the Respondents' submissions fall away. First, the proposition at RS[26]-[31] that the amount retained by the agent or trustee under s254(1)(d) cannot be adjusted from time to time must be rejected. Whenever the retention authorization and obligation is engaged (that is, whenever a call is made on the agent or trustee to distribute moneys[3]), the agent or trustee will then be required to ascertain an amount which is sufficient to pay the tax which is or will become due in respect of the IPG. That ascertainment may change from time to time as circumstances change (ie., tax losses are incurred which may reduce the tax due in respect of the IPG) leading to an adjustment of the amount retained. This (contrary to the submission at RS[28]) does not introduce a subjective element into s254(1)(d), but merely recognises its different operation in different circumstances.

7. Second, it is no answer to the Commissioner's construction of s254(1)(d) to say (as is said at RS[17a]) that, prior to an assessment, the precise tax in respect of the IPG might be uncertain. Section 254(1)(d) does not require certainty; it requires sufficiency. As has been noted, sufficiency looks to the adequacy of an amount or thing for a future purpose and will often necessarily involve some uncertainty. Section 254(1)(d) requires the agent or trustee to accommodate the uncertainty by retaining an amount that will be sufficient (or adequate) to pay that tax. Section 254(1)(e) gives the agent or trustee an incentive to be conservative in their assessment of sufficiency by placing the risk of insufficiency on the agent or trustee by the personal liability in s254(1)(e).[4] This explains why the retention obligation was not (as is noted at RS[22a]) made to depend on the agent or trustee's estimate of the tax that is or will become due. This is reasonable in circumstances where the agent or trustee has receipt of the IPG in respect of which the tax is to be paid and can, as was observed at [84] of *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598 (***Bluebottle***), ascertain the "outer boundary" of that liability.

8. Moreover, it is incorrect to say that the retention of an amount sufficient for that purpose before assessment is "impracticable" (as is said at RS[17b]).[5] As the submissions at RS[20]-[21] effectively concede, that this can be done by the agent or trustee applying to the amounts of IPG received the appropriate tax rates. The hypothetical aggrieved individual taxpayer referred to at RS[22b] could readily avoid the retention of the top marginal rate by demonstrating to the agent or trustee that a lesser rate was applicable and thus a lesser amount was sufficient to pay the tax due in respect of the IPG.

Respondents' construction of s254(1) more broadly (RS[32]-[41]):

9. The submissions at RS[32]-[41] involve the proposition that, although s254(1)(a) makes an agent or trustee "answerable as taxpayer" in respect of IPG derived in a representative capacity and makes the agent or trustee responsible for the "payment of the tax thereon", the payment obligation arises only on assessment (which is usually annual). The extent to which an agent or trustee is assessable and can thus be made

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[3] Or other occasion arises when a distribution might properly be made.

[4] However, s254(1)(e) does not place the risk on the agent or trustee if what was sufficient to pay the tax in respect of the IPG at one point becomes insufficient at another point, eg., currency fluctuations: *RCF IV* at [11] and [50]-[51].

[5] Such retention may be no more than what is required by a trustee's duty to exercise the care of a prudent person of business in the management of the trust: *Breen v Williams* (1996) 186 CLR 71 at 137 per Gummow J.

"answerable as taxpayer" in respect of IPG (including for "payment of tax thereon") is determined, it is said, by the personal liability in s254(1)(e). That personal liability in turn, depends on the scope of the retention obligation in s254(1)(d). Thus, the submission follows, the obligations in s254(1)(a) and (b) are circumscribed by the scope of the retention obligation in s254(1)(d) (see also RS[50b]).

10. This submission is erroneous at a number of levels. First, it inverts the structure of s254(1). The structure of s254(1) is that the retention obligation and authorisation in s254(1)(d) facilitate the performance of the obligations in s254(1)(a) and (b). To adopt, as the respondents do, a narrow construction of s254(1)(d) and use that construction to circumscribe the content of the responsibility created by s254(1)(a) and (b), turns s254(1) on its head. Second, it is contrary to the purpose of s254(1) which is to "make more effective the system of securing payment by a representative taxpayer who may have income to be taxed actually in hand or under his control".[6] To circumscribe the obligations in s254(1)(a) and (b) by reference to amounts that happen to be left in the hands of the agent or trustee after the issue of an assessment and therefore (on the respondent's contention) subject to s254(1)(d) would frustrate that purpose. Third, it wrongly assumes that the source of the obligation of a taxpayer to pay tax is an assessment. The obligation to pay tax arises from the revenue laws enacted by Parliament.[7] In the case of an agent or trustee to whom s254(1) applies it arises, first, from s254(1)(a). The function of the assessment is to give concrete application and ascertain the quantum of that obligation so a specified amount of tax becomes due and payable.[8] Fourth, it confuses the representative liability which s254(1)(a) creates (which is a liability "*quoad* assets"[9]) with the personal liability s254(1)(e) creates. The latter, a separate and distinct liability, facilitates and re-inforces the former by acting, as Barton J said in *Webb v Syme*, as a form of penalty for its neglect.[10]

11. A further authority supporting the Commissioner's approach is *Commissioner of Stamps (WA) v West Australian Trustee, Executor and Agency Co Ltd* (1925) 36 CLR 98. There the Court by majority held that the expression "debts due to the deceased" in State Probate legislation embraced the tax, whether assessed or not, which at the person's death was payable or might thereafter become payable on discharge of any legal obligation imposed by law on the deceased during his lifetime. The forerunner to s 254 (s 89 of the 1922 Act) was noted as part of the scheme leading to this conclusion.[11]

Differences between s254 and 255 of the 1936 Act (RS[42]-[53]):

12. The consistent approach of RS[42] – [50] is to diminish the significance of the differences between s254(1) and s255(1) of the 1936 Act in the construction of s254(1)(d) and s255(1)(b) by asserting that because s254(1)(d) and s255(1)(b) are "expressed in virtually identical terms" those differences have no significance in their construction. However, the construction of s254(1)(d) is not to be approached by merely observing textual similarity between it and s255(1)(b) and applying the

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[6] *Webb v Syme* (1909) 10 CLR 482 (***Webb v Syme***) at 510 per O'Connor J.
[7] *Commissioner of Taxation v Jones* (1999) 86 FCR 282 at [15]-[16].
[8] *Batagol v Commissioner of Taxation* (1963) 109 CLR 243 at 252.
[9] *Deputy Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 42; *Commissioner of Taxation v Prestige Motors Pty Limited* (1994) 181 CLR 1 at 11.
[10] *Webb v Syme* at 498.
[11] At 104.4; 115.6-116.3; 118.4. The case was subsequently discussed in *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 9, 17.

construction arrived out in *Bluebottle* in relation to the latter section to the former without attending to the separate context, object and purpose of the provisions: *RCF IV* at [2]. The significance of the differences of context between the two sections was recognised in *Bluebottle*: at [84]. Moreover, the presence of the same or similar words in different sections is not a basis to reject or diminish the significance of contextual differences that may suggest a differing construction of each section. On the contrary, as Mason J observed in *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 (***Clyne***) at 16, any presumption that similar words or expressions should be construed similarly has little force in revenue statutes and readily yields to context.

13. The similarity between s254(1)(d) and s255(1)(b) should not be overstated. A critical textual difference is that the object of s254(1)(d) is the tax which is or will become due in respect of the IPG derived by the agent or trustee while the object of s255(1)(d) is the tax which is or will become due by the non-resident.

14. The fact that the agent or trustee will not be a stranger to the IPG in respect of which tax liability the subject of s254(1) arises (in contrast to a controller under s255(1) who may be - referred to at RS[45] as the Intimacy Issue") is not just a reflection that the agent or trustee may have greater knowledge of the beneficiary or principal's taxation affairs than a controller under s255(1) may have of the non-resident's (cf., RS[46]-[48]). The fact that the amounts which the agent or trustee deals establish the relevant liability under s254(1) and mark its outer boundary was one of the matters identified in *Bluebottle* at [84] as supplying a "radically different" context to s255(1) of the 1936 Act. It is a matter that puts the agent or trustee in a qualitatively different position *qua* the IPG, and what will be sufficient to pay the tax in respect of it, than the controller under s255 in relation to the non-resident's tax liability. Even the agents referred to at RS[47] will be able, when called on by the beneficiary or principal to pay amounts over, to determine without any other information the "outer boundary" of the amounts to be retained under s254(1)(d) by looking to the IPG they have derived. If the principal or beneficiaries wish to reduce the amount retained they can always supply the necessary information to permit the agent or trustee to do so.

The "Absurdity Issue" (RS[51]-[53]):

15. At RS[51]-[53] the respondents assert that the construction of s254(1)(d) contended for by the Commissioner would lead to absurd or impractical results. That submission should not be accepted. First, the assertion that on the Commissioner's construction s254(1)(d) would require an agent or trustee to "constantly and continually calculate the likely tax" is incorrect. As seen above, the retention obligation in s254(1)(d) attaches as and when the agent or trustee is called on to make, or otherwise considering making, distributions to the principal or beneficiary. Second, what the agent or trustee must determine on those occasions is not the "likely tax" of the beneficiary or principal, but what amount will be *sufficient* to pay the tax which is or will become due *in respect of the IPG*. The concept of sufficiency and the focus on the tax due in respect of the IPG qualify the agent or trustee's retention obligation and authorization. Third, beyond mere assertion, the respondents never explain why the obligation and authorization in s254(1)(d), so understood, imposes absurd or impractical requirements on agents or trustees.

16. In circumstances where the purpose of the retention obligation in s254(1)(d) is to facilitate the performance of the obligations in 254(1)(a) by authorizing and requiring the

agent or trustee "keep back out of the trust [or agency] receipts enough to pay the tax if it is not obtained from the beneficiary [or principal]"[12], a construction which left those receipts vulnerable to be depleted between receipt and assessment by demands for distributions from the principal or beneficiary, with the result that the trustee or agent's capacity to met the obligations in s254(1)(a) is diminished, would frustrate s254(1) by the actions of the very persons whose default in paying tax it is designed to safeguard. Such a result might be properly described as absurd.

Bluebottle (RS[54] – [61]):

17. The respondents submit that *Bluebottle* is the controlling authority. However, the submissions at RS[54]-[61] never move beyond the observation that the phrase "tax which is or will become due" appears in both s254(1)(d) and s255(1)(b) of the 1936 Act and an accompanying assertion that, therefore, the reasoning in *Bluebottle* at [78]-[79] applies equally to s254(1)(d). No attempt is made to explore the contextual features of s255(1) which led to that construction of s255(1)(b) and, in particular, the fact that the obligation of the controller under s255(1)(a), with which the retention obligation in s255(1)(b) intersected and by which it was supplied with content, rested on an assessment to the non-resident: *Bluebottle* at [72], [76]-[77], [82]. No explanation is provided as to why the absence of any similar intersection between s254(1)(a) and (b) and s254(1)(d) is of no significance. Nor is any attempt made to explain why the conclusion in *Bluebottle* to the effect that the retention obligation and authorization in s255(1)(b) of the controller depends on an assessment being issued to the *non-resident* leads to the conclusion that the retention obligation and authorization in s254(1)(d) of the agent or trustee depends on an assessment being issued to the *agent or trustee.* Further, the matters identified at [84] of *Bluebottle,* which were said to provide a "radically different" context between s255(1) and the predecessor of s254(1) (s52 of the 1915 Act), are simply not addressed.

18. In summary, s254(1) and s255(1) of the 1936 Act have a separate operation. It is an significant oversimplification to say (as is said at RS[61]) that they have the same purpose (recovery of tax liabilities from persons other than the primary taxpayers) and should therefore be construed similarly without attending to the differences in the nature of the persons, IPG and tax liabilities to which each applies and the differing relations between those three things in each section. Given that separate operation, legislative harmony does not demand that s254(1)(d) be given the same construction as s255(1)(b). In the same way, the Court in *Bluebottle* did not consider the construction of s218 of the 1936 Act arrived at in *Clyne* demanded a like construction of s255(1)(b): at [92]-[93].

Dated: 2 July 2015

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[12] *Webb v Syme* at 497 per Barton J.