



## HIGH COURT OF AUSTRALIA

Public Information Officer

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RAFTLAND PTY LTD AS TRUSTEE OF THE RAFTLAND TRUST v  
COMMISSIONER OF TAXATION

The High Court of Australia today upheld the assessments of income tax on Raftland in its capacity as trustee of the Raftland Trust. The principal issue concerned entitlements to certain trust income.

The transactions giving rise to the assessments were aimed at securing a fiscal benefit by enabling accumulated tax losses, earlier incurred by a trust estate called the E&M Unit Trust (E&M), to be set off against the income of unrelated profitable businesses controlled by the Heran brothers, Brian, Martin and Stephen. The original trustee of E&M, established in 1986, was E&M Investments whose directors were Mark and Elizabeth Thomasz (formerly Carey). The business of the trust was the acquisition and sale of property. The business failed, with the 1991 tax return disclosing losses of more than \$4 million. Mr and Mrs Thomasz became bankrupt but had been discharged by the time of the transactions in 1995. Mrs Thomasz's son, Glen Carey, took over from E&M Investments as trustee of E&M. In May 1995, taxable profits for two Heran companies were forecast to be almost \$3 million. Brian Heran contacted solicitor Peter Tobin about the possible acquisition of a trust with accumulated tax losses. Mr Tobin organised for Mr Heran to acquire control of E&M for \$250,000. The Heran brothers, who controlled various building development and property rental companies, acquired Raftland, which became the trustee of the Raftland Trust on or before 30 June 1995. Beneficiaries were divided into three classes: primary (the Herans); secondary (Heran relatives, and various associated entities); and tertiary (the E&M trustee). Mr Carey removed himself as trustee of E&M and appointed Raftland as trustee. The Raftland Trust tax return for 1995 asserted the distribution of net income of \$2,849,467 to E&M. Raftland did not pay that amount, apart from the \$250,000, but applied it for the benefit of certain related parties.

In 2002, the Commissioner issues notices of amended assessment for the 1995, 1996 and 1997 tax years. Total taxable income for those years was stated to be \$4,015,207 with total tax, including penalty tax and interest, assessed at \$4,025,070.30. After Raftland's objections were disallowed, it appealed unsuccessfully to the Federal Court of Australia. Justice Susan Kiefel found that the \$250,000 paid to the Thomaszes was a one-off payment and nothing further was to take place between the Thomaszes and the Herans. She held that the Raftland Trust deed which purported to create an entitlement in E&M as tertiary beneficiary was a sham or façade and the Thomaszes had no entitlement to trust income. The Full Court of the Federal Court upheld Justice Kiefel's decision, apart from \$57,973 related to 1995-96 which was the subject of an application by the Commissioner for special leave to cross-appeal. On the basis of different reasoning, the Full Court agreed that the net income derived by Raftland fell to be assessed pursuant to section 99A of the *Income Tax Assessment Act*, which provides that in certain circumstances trust income in the hands of the trustee was to be taxed at a special rate. Raftland appealed to the High Court.

The High Court unanimously dismissed the appeal. It granted the Commissioner special leave to cross-appeal and allowed the cross-appeal. The Court held that for the tax scheme to succeed E&M had to have been entitled to the income of the Raftland Trust. It upheld Justice Kiefel's conclusion that the intention of both the Herans and the Thomaszes was that \$250,000 was all the beneficiaries of E&M were ever to receive or to seek, and that the entitlement under the Raftland Trust deed was not intended to have substantive, as opposed to apparent, legal effect. The Court also upheld her finding that E&M was not entitled to the Raftland Trust income within the meaning of section 100A of the Act, while the Heran brothers were entitled. Therefore the tax was correctly assessed under section 99A.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*