

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF
AUSTRALIA

Appellant

MARTIN ANDREW THOMAS

Respondent



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APPELLANT'S SUBMISSIONS
THOMAS (PENALTY)

Part I: Certification

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

20 **Part II: Issues arising**

2. The same primary issue arises in this and each of the four appeals, as set out at [2] of the Commissioner's submissions in appeal B60 of 2017 (**Thomas Primary Tax**).
3. That is because of the way in which the Full Federal Court addressed the four proceedings. Again for convenience, the four related appeals concern:
 - 30 (a) *Martin Andrew Thomas v Commissioner of Taxation* (QUD 72/2016), in which Mr Thomas appealed from the orders of Greenwood J in respect to his liability for primary tax for the 2006 to 2009 tax years. The Commissioner cross-appealed in respect of Mr Thomas' net income in 2006, 2007 and 2008 (now B60/2017);
 - 40 (b) *Martin Andrew Pty Ltd v Commissioner of Taxation* (QUD 78/2016), in which MAPL appealed from the orders of Greenwood J in respect of the 2008 tax year. The Commissioner cross-appealed in respect of net income in 2008 (now B61/2017) (**MAPL Primary Tax**);
 - (c) *Commissioner of Taxation v Thomas Nominees Pty Ltd* (QUD 79/2016), in which the Commissioner appealed in respect of Greenwood J's construction of s101 of

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the 1936 Act, or in his application of it contrary to evidence in respect of Mr Thomas' entitlement to a share of the income of the trust estate in 2009. Thomas Nominees filed a Notice of Contention in support of the trial judge's conclusions (now B62/2017) (**2009 Year**);

- 10 (d) *Commissioner of Taxation v Martin Andrew Thomas* (QUD 80/2016), in which the Commissioner appealed against Greenwood J's determination that Mr Thomas was not liable to an administrative penalty in respect of each of the income years 2006 to 2009 (now B63/2017) (**Thomas Penalty**).

Part III: Certificate regarding s 78B Judiciary Act 1903

- 20 2. The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and has determined that notice is not required.

Part IV: Reports and authorised reports citations

- 30 3. *Thomas v The Commissioner of Taxation* [2015] FCA 968.
4. *Thomas v The Commissioner of Taxation* [2017] FCAFC 57.
5. In the particular circumstances, *Thomas Nominees Pty Ltd v Thomas* (2010) [2010] QSC 417; 80 ATR 828.

Part V: Narrative of relevant facts found or admitted

6. The Appellant repeats the narrative of relevant facts set out in his submissions in appeal B 60/2017.

Part VI: Argument

- 40 7. Pagone J treated the several proceedings, and the reasons for the final orders, as turning on the one issue. He was of the view (FCAFC [7]) 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." In that regard, Pagone J's reasons at FCAFC [7]-[22] dealt with the statutory context and facts, in particular franking credits under Division 207; paragraph [23] commenced with the "necessity" of considering whether the operation of Division 207 was affected by the orders of Applegarth J, with such
50 consideration following at [23]-[27]; provided further consideration in respect of the 2009 Year proceeding at [28]-[29]; and concluded that because of his conclusions on the

Declaration and *Executor Trustee*, it was unnecessary to consider the question of penalties at [30].

8. The principal issue has been described in the Thomas Primary Tax submissions at [2].
9. The Appellant repeats the submissions made in appeal B 60/2017 which, relevantly for the purposes of this appeal, address: the relevant legislative context; the application and reach of *Executor Trustee*; the proceedings in the Supreme Court of Queensland; and the correct disposition of the tax issues. Those matters are sufficient to dispose of this appeal.
10. The matter arising in this appeal, of Mr Thomas's liability to administrative penalties in each of the 2006 to 2008 income years, was, for the reason set out in paragraph [7] above, not effectively reached or determined by the Full Federal Court. Accordingly, if the Commissioner succeeds on grounds 2 and 3 of his notice of appeal in each appeal, that matter ought to be remitted to the Full Federal Court for determination.

Part VII: Statutes

11. The relevant statutes are set out in the annexure to the Thomas Primary Tax submissions (B60/2017).

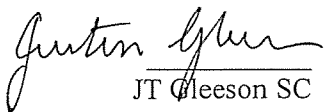
Part VIII: Orders

12. The appeal be allowed, with costs.
13. The proceeding be remitted to the Full Federal Court for determination according to law.

Part IX: Estimate

14. The estimated time required for oral argument of the appellant in this matter is included in the estimate of time in the Commissioner's submissions in Thomas Primary Tax (B60/2017).

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