

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO B 61 OF 2017

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF
AUSTRALIA
Appellant

MARTIN ANDREW PTY LTD
ACN 063 993 055
Respondent

APPELLANT'S SUBMISSIONS IN REPLY
(MAPL PRIMARY TAX)

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

Part II: Argument

2. As was noted in the Commissioner’s submissions in AS B61 at [4] and [12], the resolution of MAPL’s tax liability in the 2008 year is the corollary of Mr Thomas’s tax liability in the 2006 to 2008 income years. The Commissioner relies on his submissions at AS B60 [33]-[42] (The Taxation Scheme) and AS B60 [43]-[52] (The correct tax position on the facts); and on his reply in B60 at [8].

3. **Respondent’s Issue 3.** In this appeal, the only issue separately addressed by MAPL is Issue 3 (identified at RS B60 [3(c)]), being the construction and application of the Resolutions.

4. **The Resolutions.** Having regard to the “ultimate question” stated at RS B60 [2], and to Issue 3, it is convenient to set out the Resolutions here taking, as Pagone J did, the Resolutions passed in 2006:²

TRUST INCOME DISTRIBUTION	Resolved pursuant to the powers vested in the trustee under the Deed of Settlement establishing the abovenamed trust fund <u>that the net income of the trust fund</u> for the financial year ended 30 JUNE 2006 be applied for the benefit of the beneficiaries listed hereunder by credit to accounts maintained by the trustee for them:		
	BENEFICIARY	PROPORTION	
	MARTIN A THOMAS	The first \$21,600	
	MARTIN ANDREW PTY LTD	The balance.	
TRUST INCOME DISTRIBUTION	Resolved pursuant to the powers vested in the trustee under the Deed of Settlement establishing the abovenamed trust fund <u>that the net income of the trust fund</u> for the financial year ended 30 JUNE 2006 be applied for the benefit of the beneficiaries listed hereunder by credit to accounts maintained by the trustee for them:		
	BENEFICIARY	PROPORTION	
	MARTIN A THOMAS	<u>Franking Credits</u>	\$2,416,217.92

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 MAPL Primary Tax (this appeal) are denoted by B61, to the 2009 Year by B62 and to Thomas Penalty by B63, where AS refers to the Commissioner’s submissions and RS refers to the Respondent’s submissions.

² The text is set out in FCAFC at [19], per Pagone J. See also FCA, at [33] per Greenwood J.

		TFN Withheld	\$17,502.00
	MARTIN ANDREW PTY LTD	Franking Credits	\$228,900.38
		Foreign Tax Credits	\$4,267.42
			(Emphasis added)


- 10 5. **Subject of the Resolutions.** The Resolutions both purport to apply the “net income of the Trust”. However, their intended effect and application, according to the evidence recorded³ and findings made by Greenwood J, were that the Net Income Resolutions purported to distribute the s 95 net income of the Trust whereas the Franking Credit Resolutions purported to distribute the franking credits associated with franked distributions to the Trust, such that the “net income” the subject of each Resolution was not the same kind of net income.
- 20 6. **Resolutions have no effect.** As the Commissioner submitted at AS B60 [51], the Franking Credit Resolutions have no effect for the purposes of Div 207 because:
- 30 (a) as Pagone J observed at FCAFC [21] (in his statement of his preliminary view), once the Net Income Resolutions have done their work, all net income of the Trust has been allocated between the beneficiaries; there is no net income of the Trust left over to be distributed by the Franking Credit Resolutions; and
- (b) they are premised on the Bifurcation Assumption (namely that franking credits are a separate and distinct species of income capable of being distributed separately from the “other” net income of the Trust), which is incorrect as a matter of the proper construction of Div 207 for the reasons Pagone J stated at FCAFC [22].
- 40 7. There is no artificiality or arbitrariness involved in attributing no function to the Franking Credit Resolutions in circumstances where, as Pagone J observed,⁴ they could not distribute to either Beneficiary any of the Trust’s net income because it had been distributed by the Net Income Resolutions. Rather, insofar as they are construed to operate on the actual “net income” of the Trust in order to have any effect, the Franking Credit Resolutions would require the distribution pursuant to the Net Income Resolutions
- 50 artificially to be ignored.

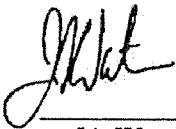
³ FCA [248]-[258], [493] and [495]-[496].

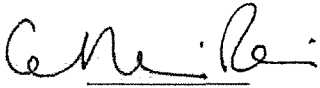
⁴ FCAFC [22].

8. MAPL contends at [7] that the resolutions must be read together. Neither MAPL nor Mr Thomas has, by notice of contention or otherwise, sought to have the Net Income Resolutions and Franking Credit Resolutions treated as a single instrument in each year.⁵
9. MAPL then contends at [12] that certain propositions of construction “would allow a court to give effect to a resolution that states the result intended to be achieved, so long as the trustee is empowered to achieve the result.” It adds, “...here the trustee made it clear what result was desired, but was held to have mistaken the formal mechanics required to achieve the result.”
10. This is not a proper or sufficient basis for a court to give effect to the Resolutions by rewriting them. As the Commissioner has submitted in his reply in Thomas Primary Tax in B60 at [12(b)], rectification required the Trustee to identify the language it claimed the Resolution ought to have been expressed in but was not.
11. MAPL’s contention at [12] is an invitation to bypass the basis for and requirements of equitable rectification by reading the Resolutions as one and focussing impermissibly “on the result intended to be achieved”.
12. **Disposition of this appeal.** The Commissioner refers to his submissions in reply in B60 at [13], as the share of franked distributions and franking credits attributable to MAPL in 2008 is the corollary of the share of franked distributions and franking credits attributable to Martin Thomas in 2006 to 2008.
13. 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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⁵ See the analysis of the Resolutions as separate instruments by Greenwood J at FCA [248]-[252]; and by Pagone J at FCAFC [21].