

**COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA v TOMARAS & ORS (B9/2018)**

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 13 October 2017

In July 2009 the first respondent (“the Wife”) and the second respondent (“the Husband”) separated after 17 years of marriage. In November 2009 a Deputy Commissioner of Taxation obtained a default judgment against the Wife in the amount of \$127,669.36 (including costs and interest) for unpaid debts comprising income tax, the Medicare Levy, penalties and general interest charge (“GIC”). The Wife did not pay the judgment debt and in the ensuing years GIC continued to accrue.

In December 2013 the Wife commenced proceedings against the Husband in the Federal Circuit Court, seeking an alteration of their property interests under s 79 of the *Family Law Act 1979* (Cth) (“the Act”). The orders sought by the Wife included an order that the Husband execute documents to release her from and indemnify her against certain tax and bank liabilities, and an order that the Husband be responsible for all tax payable on income that would come to be received by the Wife to a particular point in time. The appellant (“the Commissioner”) then intervened in the proceedings.

On 22 August 2016 Judge Purdon-Sully stated the following question (“the Question”) for the opinion of the Full Court of the Family Court:

*Does s 90AE(1)-(2) of the Act grant the court power to make Order 8 of the final orders sought in the amended initiating application of the Wife?*

Order 8 in its amended form was in effect as follows:

8. *Pursuant to s 90AE(1)(b) of the Act, in respect of the Wife’s indebtedness to the Commissioner for taxation-related liabilities in the amount of \$256,078.32 as at 9 August 2016 plus GIC, the Husband be substituted for the Wife as the debtor and the Husband be solely liable to the Commissioner for the said debt.*

Before the Full Court of the Family Court (Thackray, Strickland and Aldridge JJ), the Commissioner’s position was argued on the basis that a Presumption that statutory provisions expressed in general terms do not bind the Crown (“the Presumption”) applied in respect of s 90AE and that the Presumption was not rebutted by any discernible legislative intention that the Crown be bound.

The Full Court answered the Question as follows:

*Yes, but with the proviso that s 90AE(1) confers power only to make an order that the Commissioner be directed to substitute the Husband for the Wife in relation to the debt owed by the Wife to the Commissioner.*

In construing s 90AE, the Full Court took the Commissioner to be a “creditor” of a party to a marriage in respect of any tax-related liability of the party that was

due and payable. In that regard, their Honours noted that the *Taxation Administration Act 1953* (Cth) provided (in Sched 1, s 255-5) that such a liability was a debt due to the Commonwealth, payable to the Commissioner.

Thackray and Strickland JJ held that there was no question of whether the Presumption was rebutted, as the Presumption did not apply to s 90AE at all. This was because the Presumption applied only to provisions that imposed an obligation or restraint on the Crown, and an order made under s 90AE would not inevitably have such an effect. Rather, an order under s 90AE would have an adverse effect on the Crown (in this case, the Commissioner) only in the event of an unforeseeable default by the substitute debtor.

Aldridge J generally agreed with Thackray and Strickland JJ and concurred with their answer to the Question. His Honour however considered that although an order made under s 90AE in relation to tax liabilities would impose an obligation or restraint on the Crown, that impact was a relevant consideration rather than a threshold issue in determining whether the Crown was bound. Aldridge J also considered that a substitution of debtor did not sit well with the right of objection to an assessment for tax that was available to the “taxpayer” under s 175A of the *Income Tax Assessment Act 1936* (Cth), “taxpayer” being defined in that Act as a person deriving income, profit or capital gains. His Honour however found no practical difficulty for the Commissioner and considered that the issue was not of critical significance.

The grounds of appeal are:

- The Full Court erred at [16]-[20] (Thackray and Strickland JJ) in concluding that the Presumption that the Crown is not bound by a statute did not apply in the construction of s 90AE of the Act.
- The Full Court erred, in obiter, in concluding at [59] (Thackray and Strickland JJ) and [61] (Aldridge J) that, if the Presumption had applied, it would have been rebutted in respect of s 90AE of the Act.
- The Full Court should have held, particularly having regard to the detailed code constituted by the taxation laws, that “creditor” in s 90AE(1) and “third party” in s 90AE(2) does not include the Commissioner or the Commonwealth and that “debt” in s 90AE(1) does not include tax-related liabilities.