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

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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
20 **ACN 094 238 678 (IN LIQUIDATION)**

Respondent

APPELLANT'S SUBMISSIONS

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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: Issues

2. This appeal raises three issues:

(a) whether a "trustee" within the meaning of s6 of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**) (including a liquidator) is subject to the requirements and authorizations of s254 of the 1936 Act only in relation to income, profits or gains (**IPG**) for which (s)he or it is assessable to tax under Part III, Div 6 of the 1936 (which can only arise in the limited circumstance of there being a "trust estate") (**Issue 1**)[1];

(b) whether a "trustee" or "agent" within the meaning of s6 of the 1936 Act is subject to the obligations, authorizations and requirements in s254 of the 1936 Act only in relation to IPG for which (s)he or it is assessable under some other provision of the revenue law; or, whether s254 creates by its own force an ancillary or secondary liability, and associated obligations and authorizations on a trustee or agent, for the more convenient collection of tax on IPG for which the beneficiary or principal is principally liable (**Issue 2**); and

(c) whether, following the derivation by a trustee or agent of IPG in a representative capacity, but prior to an assessment for tax being made in respect of that IPG, s254(1)(d) requires and authorizes the agent or trustee to retain moneys then in their hands or thereafter coming to them in their representative capacity so much as is sufficient to pay tax on the IPG; or, whether s254(1)(d) only authorizes and requires a trustee or agent to retain such moneys after an assessment for tax on the IPG (**Issue 3**).[2]

Part III: *Judiciary Act 1903* (Cth)

3. The Commissioner certifies that he has considered whether a notice should be given under s78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and that no notice needs to be given.

Part IV: Citation

4. The judgment of the Full Court of the Federal Court is reported as *Federal Commissioner of Taxation v Australian Building Systems Pty Limited (in liq)* [2014] FCAFC 133; (2014) 226 FCR 263 (**FC**).

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1 Section 254(1)(a) relevantly has two limbs: the first concerning IPG derived by the trustee or agent in their representative capacity; the second (applicable to agents only) concerning IPG derived by the principal by virtue of the agency. It is the first limb that is relevant on the facts of this case and is thus the focus of these submissions, although the submissions are applicable to both limbs.

2 This issue is also raised by para 1 of the Notice of Contention filed 8 May 2015.

5. The judgment of the primary judge is reported as *Australian Building Systems Pty Limited (in liq) v Federal Commissioner of Taxation* [2014] FCA 116; (2014) 97 ACSR 614 (**PJ**).

Part V: Facts

6. On 2 March 2011 Australian Building Systems Pty Limited (**ABS**) was placed into voluntary administration under Part 5.3A of the *Corporations Act 2001* (Cth) (**Corps Act**). On 6 April 2011 ABS's creditors resolved that it be wound up under s439C of the Corps Act. ABS's administrators, Ms Ginette Muller and Ms Joanne Dunn, were appointed liquidators of ABS (**the Liquidators**) (PJ[1]).

7. At the time it entered administration, ABS owned real property at 118-128 Magnesium Drive, Crestmead Queensland (**Crestmead property**). On 21 July 2011 the Liquidators caused ABS to enter into a contract of sale for the Crestmead property. That caused CGT event A1 to happen under s104-10 of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**). The capital proceeds from the disposal of the Crestmead property under Div 116 of the 1997 Act were $4,000,000. ABS's cost base for the Crestmead property under Div 110 of the 1997 Act was around $2,880,800. This gave rise to a capital gain for ABS under s104-10(4) of the 1997 Act in the order of $1,200,000 (PJ[10] – [11]; FC [2]).

8. In January 2012, the Liquidators applied for a private ruling from the Commissioner pursuant to Div 390 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) (**Administration Act**). The questions posed in that private ruling application concerned whether the Liquidators were required, pursuant to s254 of the 1936 Act, to retain out of the proceeds of sale of an asset monies for any capital gains tax liability from the time of crystallization of the capital gain or only once an assessment had issued (Questions 2 and 3); and whether the Liquidators were required to account to the Commissioner out of the proceeds of sale of the asset for any capital gains tax liability crystalizing from the sale of the asset (Question 1). In May 2012 the Commissioner ruled that under s254 of the 1936 Act the Liquidators were required to retain out of the proceeds of sale of an asset monies for any capital gains tax liability from the time of the crystallization of the capital gain (and not merely from the time of an assessment) and were required to account to the Commissioner out of the proceeds of sale for that liability (PJ[3] – [4]).

9. In July 2012 ABS objected to the Commissioner's private ruling pursuant to s359-60(1) of Schedule 1 of the Administration Act. In August 2012 the Commissioner disallowed that objection (**objection decision**). On 5 October 2012 ABS commenced proceedings pursuant to s14ZZ of the Administration Act appealing to the Federal Court against the objection decision (PJ[5]) (**Part IVC proceeding**).

10. On 11 October 2012 the Liquidators commenced a further set of proceedings in the Federal Court under s1337B of the Corps Act and/or s39B of the Judiciary Act seeking declaratory relief corresponding to the answers which ABS contended should have been given by the Commissioner to the questions posed in the private ruling application (PJ[7] and [14]) (**declaratory proceeding**).

11. The Part IVC proceeding and the declaratory proceeding were different means of raising essentially the same legal question: was the construction which the Commissioner had placed on s 254 of the 1936 Act correct?

12. The primary judge, Logan J, heard the Part IVC proceeding and the declaratory proceeding concurrently. In his reasons for judgment, Logan J identified two issues for decision: first, whether the operation of s501, s555 and s556 of the Corps Act was affected by s254 of the 1936 Act by, in effect, s254 imposing a liability on (relevantly) a liquidator that came within s556(1)(a) of the Corps Act with the result that the Commissioner was given a form of priority over other creditors (corresponding with Question 1 posed in the application for a private ruling); and, second, whether a retention obligation under s254(1)(d) arose on the occurrence of a CGT event (here the entry into the contract for disposal of the Crestmead property) or only upon the later issue of an assessment (PJ[13]) (corresponding with Questions 2 and 3 posed in the private ruling application).

13. Logan J concluded that, on its proper construction, s254 of the 1936 Act imposed no retention or payment obligation on the Liquidators in the absence of an assessment, thus resolving the second issue adversely to the Commissioner. In the light of that conclusion, Logan J found it unnecessary to address the first issue (PJ[25]). Accordingly, Logan J allowed the appeal in the Part IVC proceeding and substituted answers to the questions posed in the private ruling application consistent with his conclusion. In the declaratory proceeding, Logan J declared, in effect, that in the absence of an assessment the Liquidators were not required under s254(1)(d) of the 1936 Act to retain from the proceeds of sale of the Crestmead property sufficient money to pay such tax which was, or would become, due as a result of the capital gain arising from its disposal.

14. The Commissioner appealed from the judgment and orders of Logan J in both the Part IVC proceeding and the declaratory proceeding. On 8 October 2014 the Full Court handed down judgment dismissing the Commissioner's appeal. On 17 April 2015 the Commissioner was granted special leave to appeal to this Court ([2015] HCA Trans 82).

Part IV: Argument:

Issue 1: Is s254 of the 1936 Act in its application to trustees limited to circumstances where the trustee is assessable for the IPG under Div 6 of Part III of the 1936 Act?

15. The central proposition relied on by Edmonds J (Collier J agreeing) in the Full Court to dismiss the Commissioner's appeal was that s254 of the 1936 Act could not operate in relation to the IPG derived on the sale of the Crestmead property because that capital gain would be assessed to *ABS* and not the Liquidators. This, in the view of their Honours, was because of the way in which Div 6 of Part III of the 1936 Act operates. The theory was that ABS would be "presently entitled" to all the income under Division 6 of Part III. Therefore, under Div 6 of Part III of the 1936 Act, ABS would be assessed to tax and the Liquidators, as trustee, would not. Therefore, no amount of tax was, or ever could, become "due" within the meaning of s254(1)(d), whatever construction was accorded to the words "is or will become due" in s254(1)(d) of the 1936 Act (FC[2], [20], [21], [25], [28] and [29]).

16. The respondents have indicated that they do not intend to support this aspect of the reasoning of the Full Court: [2015] HCA Trans 82, p11.414 – p12.442.[3] Nevertheless, it is necessary for the Commissioner to identify the legal error in it, because the judgment of Edmonds and Collier JJ presently stands as a decision of a Chapter III court on the meaning of s 254 of the 1936 Act which, according to strong statements of principle of the Full Federal Court, obliges the Commissioner to administer s254 of the 1936 Act in accordance with the decision, even in matters involving different parties.[4] Furthermore, it is necessary to do so in order to be able to approach on the correct footing the substantive point of contention in this appeal that arises in relation to Issue 3.

17. Div 6 of Part III of the 1936 Act sets out the basic income tax treatment of the net income of a trust estate (s95AAA). Except as otherwise provided by the 1936 Act or the 1997 Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate (s96). In simplified form and assuming a resident beneficiary and trustee, the operation of Div 6 of Part III of the 1936 Act can be sketched as follows. Where a beneficiary is presently entitled to a share of the income of the trust estate, but under a legal disability, the trustee is assessable on that share of the net income of the trust estate (s98). Where there is a share of the income of the trust estate to which no beneficiary is presently entitled (and is not assessable to the trustee under s98) the trustee is assessable on the net income of the trust estate equal to that share (s99(1) – (3), s99A). Beneficiaries of a trust estate presently entitled to a share of the income of the trust estate, and not under a legal disability, are assessable on that share of the net income of the trust estate (s97).[5]

18. Thus, the central concept on which the operation of Div 6 of Part III of the 1936 Act depends is the existence of a trust estate and the presence of net income of that trust estate: *Commissioner of Taxation v Bamford* (2010) 240 CLR 481 (***FCT v Bamford***) at [22] – [27].

19. In *FCT v Bamford* at [27] – [28] the Court observed that the definition of "trustee" in s6(1) of the 1936 Act went beyond trusts of a settlement or testamentary trusts, but (the Court continued) it was not to be assumed that every person or entity which answers the statutory definition of "trustee" in s6(1) will be a trustee for the purposes of Div 6 of Part III of the 1936 Act. In *Howey v Commissioner of Taxation* (1930) 44 CLR 289 (***Howey v FCT***) at 293 Rich and Dixon JJ stated that the references to "income of the trust estate" in s31 of the *Income Tax Assessment Act 1922* (Cth) (**1922 Act**) (the predecessor to Div 6 of Part III of the 1936 Act) suggested that the

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[3] This is confirmed by para 2 of the Notice of Contention filed 8 May 2015. This aspect of the reasoning of the Full Court was not the subject of submissions by either party and was raised for the first time (and then only in passing) by members of the Full Court on the hearing of the appeal.

[4] *Commissioner of Taxation v Indooroopilly Children's Services (Qld) Pty Limited* (2007) 158 FCR 325 at [2] – [7] (Allsop J, Stone J and Edmonds J concurring). The principle as stated by Allsop J has a quasi-constitutional flavour to it. It is unnecessary within the confines of this appeal to explore the ultimate basis or reach of the stated principle, or any qualifications to it; cf the issues dealt with in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279.

[5] See *Dwight v Commissioner of Taxation* (1992) 37 FCR 178 at 183-184 per Hill J.

persons who answer the description "trustee" in (what is now) Div 6 must stand in some relation to the proprietary right in virtue of which the income arises.[6]

20. In *Bamford v FCT* at [28] the Court observed that "a liquidator although identified in para (a) [of the definition of "trustee" in s6(1) of the 1936 Act] is not a trustee of a trust estate in any ordinary sense". This is because, as indicated in the reference at fn 49 of *FCT v Bamford* and demonstrated in *Commissioner of Taxation v Linter Textiles Australia Ltd* (2005) 220 CLR 592 at [29]-[59], in the absence of a vesting order made under a provision such as s474(2) of the Corps Act (none having been made in this case), the appointment of a liquidator to a company does not divest the company of its beneficial ownership in, or render the liquidator a trustee of, the company's assets.

21. Therefore, the premise underlying the judgment of Edmonds J in the Full Court (manifest at FC[25] – [30]) that the Liquidators were "trustees of a trust estate" to whom Part III of Div 6 of the 1936 Act applied was, with respect, misconceived. Equally erroneous was the notion (also manifest in Edmonds J's judgment) that ABS was, or could be, a beneficiary presently entitled to the net income of a trust estate and thus assessable under Div 6, Part III of the 1936 Act. Thus, the "concern" expressed by Edmonds J at FC[30] as to the consequences of the Commissioner's construction of s254(1)(d) of the 1936 Act was misplaced. As between ABS and the Liquidators there was, and could be, no "trust estate" to which Div 6, Part III of the 1936 Act could apply.

22. Further, to conclude, as Edmonds and Collier JJ did, that s254 of the 1936 Act only operates in relation to "trustees" where those trustees are assessable upon the IPG to which the section applies under Part III of Division 6 of the 1936 Act is to deny the section any effective operation in relation to persons, such as liquidators, within the definition of "trustee" in s6(1) of the 1936 Act but who (in the ordinary case) are not "trustees of a trust estate" within the scope of Part III, Div 6 of the 1936 Act.

23. The three authorities referred to by Edmonds J at FC[24]–[27] do not support the conclusion arrived at by his Honour. The tentative and exploratory remarks of Rich and Dixon JJ in *Howey v FCT* at 294 (quoted at FC[24]) were directed at a circumstance where a "trustee" was amenable to being assessed under s31 of the 1922 Act. In the sentence following the passage from the judgment of Rich and Dixon JJ quoted at FC[24] it was specifically contemplated that "[i]f the appellant's case falls outside s31 [of the 1922 Act]", then s89 of the 1922 Act (the predecessor to s254 of the 1936 Act) might apply. The view of Barwick CJ in *Union-Fidelity Trustee Co of Australia v Commissioner of Taxation* (1969) 119 CLR 177 (referred to at FC[26]) was a paraphrase of s96 of the 1936 Act and was directed specifically to a circumstance where there was income of a trust estate. Likewise, the remarks of the Court in *Commissioner of Taxation v Prestige Motors Pty Limited* (1994) 181 CLR 1 (***FCT v Prestige***) at 11 (quoted at FC[27]) specifically concerned a circumstance where there was net income of a trust estate to which Div 6 of Part III of the 1936 Act could apply.

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[6] See also, *Deputy Commissioner of Taxation v Trustees of the Wheat Board of Western Australia* (1932) 48 CLR 5 at 24 per Dixon J (McTiernan J agreeing) and *Leighton v Commissioner of Taxation* [2011] FCAFC 96; (2011) 84 ATR 457 at [8] – [9].

24. Furthermore, the conclusion of Edmonds and Collier JJ is contrary to the observations earlier made in this Court in *Joshua Brothers Pty Limited v Commissioner of Taxation* (1923) 31 CLR 490 (***Joshua Bros v FCT***). The question raised in *Joshua Bros v FCT* was whether income from the sale of trading stock by a company in liquidation was assessable under the *Income Tax Assessment Act 1915* (Cth) (**1915 Act**). The Court held that it was. In the course of their judgments, three members of the Court addressed s52 of the 1915 Act, the predecessor to s254 of the 1936 Act (see FC[6]-[12]). Knox CJ observed (at 495) that "a liquidator is included in the designation of 'trustee' in s3 of the [1915 Act]. He is, therefore, made answerable by s52 for the payment of income tax on income derived by him in his representative capacity". Isaacs J (at 496) said (referring to s52 of the 1915 Act) "[t]he intention of the [1915] Act was indubitably to reach income of a company 'derived' during the regime of a liquidator". Rich J (at 501) observed that s52 of the 1915 Act, when read with the definition of "trustee" in s3 of the 1915 Act, "was intended to and does cover the case of income made by the liquidator for the company". There was no finding, or even suggestion, in *Joshua Bros v FCT* that the income from the sale of trading stock by the liquidator was assessable as income of a trust estate.[7]

Issue 2: Does s254 of the 1936 Act only operate where the trustee or agent is otherwise assessable on the IPG derived in the representative capacity?

25. Underlying the above approach of Edmonds and Collier JJ in the Full Court is a more general notion that s254 of the 1936 Act is merely a "collecting section" in the sense that it imposes no liability on an agent or trustee which has not otherwise been imposed on that agent or trustee by some other section of the 1936 Act or the 1997 Act (FC[21], [25], [28] and [29]). This notion explains why, in their Honours view, the fact that the capital gain from the sale of the Crestmead property was assessable to *ABS* was decisive in denying s254 of the 1936 Act any application in the present circumstance (FC[2], [20]-[21] and [29]).

26. Again, this is a proposition that the respondents have indicated they do not intend to support: [2015] HCA Trans 82, p11.414 – p12.442.[8] However, for the same reasons adverted to in connection with Issue 1 (see para [16] above), it is necessary for the Commissioner to address it in these submissions.

27. Under s106-35 of the 1997 Act, the disposal of the Crestmead property by the Liquidators was, for the purposes of Part 3.1 and Part 3.3 (concerning capital gains), to be treated as the act of ABS. Thus, under s102-5 of the 1997 Act, the capital gain arising from that disposal entered the calculation of ABS's net capital gain and, thus, ABS's assessable income. Consequently, under the ordinary operation of the 1997 Act and the 1936 Act, the capital gain arising from the disposal of the Crestmead property was assessable to ABS. This is what underpinned what Edmonds J

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[7] A like approach was taken by Rich, Dixon and McTiernan JJ in *Andersons Industries Ltd v Commissioner of Taxation* (1932) 47 CLR 354 (***Andersons v FCT***) at 366 concerning s47 of the *War-time Profits Tax Assessment Act 1917* (Cth) (**WP Tax Act**), which was similar to s52 of the 1915 Act, in its application to war-time profits derived by a liquidator of a company.

[8] Again, this is confirmed by para 2 of the Notice of Contention filed 8 May 2015. Also, again, this aspect of the reasoning of the Full Court was not the subject of submissions by either party and was raised (and then only in passing) for the first time by members of the Full Court on the hearing of the appeal.

characterised at FC[21] as a concession by the Commissioner's counsel in the Full Court.

28. However, the fact that ABS was principally liable and assessable for the capital gain arising by sale of the Crestmead property is not something that defeats the operation of s254 in relation to the Liquidators. Rather, it supplies the *premise* of the section's application to them. Section 254(1) assumes an anterior liability of the principal or beneficiary for tax on IPG derived by the trustee or agent in a representative capacity. It does not, however, assume or require that the trustee or agent is liable for, or assessable on, the IPG in the absence of s254(1). On the contrary, s254(1) creates, by its own force, liabilities in the agent or trustee in respect of the tax on the IPG. It does this in par. (a) by making the agent or trustee "answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of" the IPG, including "for the payment of tax thereon". Par. (b) confirms this by making the agent or trustee assessable on IPG derived in his or her representative capacity. Par. (e) creates and limits the personal liability of the agent or trustee to the amount which was or should have been retained under par. (d).

29. Accordingly, s254(1) of the 1936 Act is, in truth, both a "collecting section" and a section which imposes, by its own force, liabilities. That is, it imposes on agents and trustees liabilities for any IPG derived in their representative capacity as an aid to collection. This emerges from the text of s254, but is also supported by the consideration given in this Court and in the Privy Council to s254's colonial antecedent, s12 of the *Income Tax Act 1895* (Vic) (**1895 Act**).

30. In *Webb v Syme* (1910) 10 CLR 482 (***Webb v Syme***) Griffith CJ (at 491) described s12 of the 1895 Act as imposing a "secondary" or "ancillary" liability on the agent or trustee for the tax arising in respect of the IPG derived in a representative capacity. Section 12 of the 1895 Act gave, as Barton J explained (at 497), the "Crown recourse to [the trustee or agent] ... in aid of the enforcement of the Act and for ensuring the payment which the beneficiary [or principal] should make". To the same effect, O'Connor J observed (at 507) that s12 of the 1895 Act imposed on agents and trustees "obligations in respect of the income of the principal or the *cestui que trust* ... with the object of ensuring payment of the tax and making them effectively answerable for its payment". O'Connor J added (at 507) that "both the principal and agent, trustee and *cestui que trust*, may be assessed at the same time in respect of the same income".[9]

31. In a subsequent instalment of the same dispute, in *Syme v Commissioner for Taxes (Victoria)* (1914) 18 CLR 519 (***Syme v CoT***) at 525 Lord Sumner (giving the advice of the Privy Council) stated to the effect that s12 of the 1895 Act made the representative taxpayer (ie., agents and trustees) assessable on "the same footing" as the representee (ie., beneficiary, principal, company) in relation to IPG derived in a representative capacity and did so "for the more convenient collection of the revenue".

32. To construe s254 of the 1936 Act as a mere collecting section, not imposing any liability on an agent or trustee not otherwise provided for by the 1936 Act or the

[9] See too the description by Rich, Dixon and McTiernan JJ in *Anderson v FCT* at 366 of the liability imposed on "trustees" (including liquidators) by s47 of the WP Tax Act as a "vicarious liability".

1997 Act, creates acute difficulties in relation to agents. This is because the 1936 Act and the 1997 Act provide for the assessment of agents outside of s254 only in highly limited circumstances.[10] Thus, in addition to denying s254 of the 1936 Act any effective operation in relation to persons within the definition of "trustee" in s6(1) of the 1936 Act who are not trustees of a trust estate, the approach of Edmonds and Collier JJ to s254 also denies it any significant operation in relation to agents.

33. Consequently, Edmonds and Collier JJ were in error in approaching s254 on the basis of a need to find another specific section rendering the agent or trustee liable for tax in respect of the IPG derived in a representative capacity. In this respect Davies J was correct at FC[34] to regard s254(1) as itself providing the foundation for an assessment to a liquidator for a capital gain arising from the disposal of an asset of the company post appointment. Consistently with the remarks of O'Connor J in *Webb v Syme*, this would be in addition to, and not in substitution for, any assessment of the company (although of course only one amount of tax could ultimately be recovered).[11]

Issue 3: Does s254(1)(d) authorize and require an agent or trustee to retain sufficient to pay tax on IPG derived in a representative capacity prior to an assessment for the IPG?

Introduction:

34. The third and principal issue raised in this appeal concerns the retention obligation and authorization in s254(1)(d) of the 1936 Act and, in particular, whether, on the proper construction of s254(1)(d), that retention obligation and authorization applies on and from the derivation of IPG by the agent or trustee and both before and after an assessment is made for tax in respect of that IPG; or whether, it only applies after an assessment is made by the Commissioner in respect of the IPG.

35. Both the primary judge and the Full Court preferred the latter construction of s254(1)(d) of the 1936 Act. The basis of the conclusion of Edmonds and Collier JJ was the erroneous reasoning addressed in connection with Issue 1 and Issue 2 above.

36. The primary judge (at PJ[20]-[25]) and Davies J in the Full Court (FC[35]) reached their conclusion by an application of the conclusion of this Court in *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598 (***Bluebottle***) at [71] – [91] in relation to the phrase "is or will become due" in s255(1)(b) of the 1936 Act. That conclusion was understood to flow over to s254(1)(d) so as to construe the latter section as referring only to tax which, although assessed, is not yet due for payment.

37. For the reasons which follow, the Commissioner submits that, on its proper construction, the retention authorization and obligation in s254(1)(d) applies to a trustee or agent from the time of derivation of the IPG and not merely from the time of the assessment on the IPG. The matters of text and context which led this Court

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[10] In addition, see s132 of the 1936 Act (relating to agents of foreign owned ships) and s144 of the 1936 Act (relating to agents of foreign insurers). Under s960-105(2) of the 1997 Act an agent includes an entity determined by the Commissioner in writing to be an agent.

[11] Assessments can regularly be issued to different taxpayers on different bases in respect of the same item of income: *Deputy Commissioner of Taxation v Richard Walter Pty Limited* (1995) 183 CLR 168.

in *Bluebottle* to a different construction of s255(1)(b) are either absent from s254(1)(d) or point in the opposite direction, as the Court itself foreshadowed at [84] of *Bluebottle* might be the case. The word "due" in s254(1)(d) is, therefore, to be construed as meaning "owing", in accordance with its ordinary meaning as recognised by Gibbs CJ and Mason J in *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 (***Clyne v DCT***) at 9-10 and at 15-17. As was pointed out by Mason J in *Clyne v DCT* (at 16-17)[12] tax is owing once it is assessed. So construed, s254(1)(d) by its use of the present tense ("which is ... due") and the future tense ("which ... will become due") speaks on and from the derivation of the IPG by the agent or trustee and to a time both before and after the making of an assessment on the IPG.

History, structure and object of s254 of the 1936 Act:

38. As has been seen, s254 of the 1936 Act finds its antecedent in federal revenue legislation in s52 of the 1915 Act (set out at FC[6]) which became (subject to some presently immaterial amendments), s89 of the 1922 Act. As has also been seen, those sections found their colonial antecedent in s12 of the 1895 Act considered in *Webb v Syme* and *Syme v CoT*. Similar provisions were to be found in the revenue statutes of other colonies[13] and can be traced back to 1799.[14] A comprehensive bundle of the antecedent material is filed with these submissions.

39. In the light of that history, and noting that there was some change between the 1922 Act and 1936 Act,[15] the following five features of s254(1) of the 1936 Act are to be observed.

40. First, par. (a) makes the agent or trustee "answerable, that is to say responsible for everything necessary to ensure assessment of the [IPG] ... which is the subject of his trust [or agency], or which is received by him, and for paying the tax in respect thereof".[16] That is, it assimilates the agent or trustee to the position of a taxpayer and places on him or her a general responsibility for ensuring the payment of tax in respect of IPG derived in a representative capacity.

41. Second, par. (b), as a more particular expression of the responsibility created by par. (a), obliges the agent or trustee to make returns in respect of the IPG and be assessed thereon, "but in a representative capacity only". That is, it creates a liability "*quoad* assets" which "imposes a debt to be borne by the estate".[17] In the words of Rich, Dixon and McTiernan JJ, it is a "vicarious liability which is limited and is never personal unless [s]he disposes of assets while the tax is unpaid".[18]

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[12] With the agreement of Aickin J and Wilson J at 23 and Brennan J at 24.

[13] See eg., s19 and 20 of the *Land and Income Tax Assessment Act 1895* (NSW), considered in Commissioners of *Taxation v Abbey* (1901) 1 SR(NSW) 4 and *Miller v Simpson* (1903) 3 SR (NSW) 386.

[14] 39 Geo III c.13, §XCI; see also *Income Tax Act 1842* (5 & 6 Vict c. 35), s44.

[15] Section 89(d) of the 1922 Act was not re-enacted in s254 and s89(e) of the 1922 Act became s254(1)(d) but was amended with the effect that the personal liability was not restricted to moneys paid away after the Commissioner had required the agent or trustee to make a return.

[16] *Webb v Syme* at 497 per Barton J, at 507 per O'Connor J. See also, Griffith CJ at 490.

[17] *Deputy Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 42; *FCT v Prestige* at 11.

[18] *Andersons v FCT* at 366 in relation to s47 of the WP Tax Act.

42. Third, the authorization and requirement to retain in par. (d) facilitates the satisfaction of the obligations created by par. (a) and (b) by permitting and requiring the creation of a fund out of which that liability may be satisfied. It provides the trustee or agent with an answer to any demand by the principal or beneficiary for payment over of the IPG derived, or other moneys in the hands of the trustee or agent, which are required to pay the tax in respect of the IPG.[19] As Barton J explained in *Webb v Syme* (at 497), it enables and requires the agent or trustee to "keep back out of the trust [or agency] receipts enough to pay the tax if it is not obtained from the beneficiary [or principal] and demand is made on himself".

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43. Fourth, par. (e) creates a personal liability on the agent or trustee in the circumstances of a failure to observe his or her retention obligations, but limited to the amount retained or which should have been retained under par. (d). In *Webb v Syme* Barton J described the personal liability as in the nature of "a penalty for not keeping a reserve of income or funds in hand to satisfy the tax". Likewise, O'Connor J saw it as a means of addressing neglect by the agent or trustee of their obligations.[20] The section does not otherwise impose a liability or sanction for breach.

20 44. Fifth, in further assimilation of the agent or trustee to the position of taxpayer, par. (h) gives the Commissioner the same rights and remedies against "attachable property" vested in or under the control or management of the agent or trustee as the Commissioner would have against the property of any other taxpayer. "[A]ttachable property" includes property capable of being taken or seized at common law under a writ of *fieri facias*, debts potentially subject to statutory garnishee procedures for the recovery of judgment debts and debts potentially the subject of notices issued by the Commissioner under s260-5 of Schedule 1 of the Administration Act.[21]

Comparison of s254 of the 1936 Act with s255 of the 1936 Act and the relevance of
30 *Bluebottle to s254:*

45. As has been seen, the judgment of the primary judge (at PJ[20]-[25]), with which Davies J agreed in the Full Court (at FC[35]), rested on an application of the construction accorded to s255(1)(b) of the 1936 Act in *Bluebottle* and, in particular, the words "is or will become due", to s254(1)(d). The same may be said of the brief, *obiter* remarks of Fraser JA in *Deputy Commissioner of Taxation v Barkworth Olives* [2010] QCA 80; [2011] 1 Qd R 326 (***DCT v Barkworth Olives***) at [29].

46. However, what that application overlooked is the substantial textual and contextual
40 differences which obtain between s254 and s255 of the 1936 Act. In *Bluebottle* at [84] the Court noted, with reference to s52 of the 1915 Act (the predecessor of s254) that while there were "obvious similarities" in the wording of the retention authorization and requirements in (what is now) s254(1)(d) and s255(1)(b), the context in which those authorizations and requirements appear in the respective sections is "radically different". Those differences can be identified as follows.

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[19] See *Commissioner of Taxation v Resource Capital Fund IV LP* [2013] FCAFC 118; (2013) 215 FCR 1 (***FCT v RCF IV***) at [38] in relation to s255(1)(b), but equally applicable to s254(1)(d).

[20] *Webb v Syme* at 498 per Barton J, at 507 per O'Connor J. See also, Griffith CJ at 490.

[21] *Bruton Holdings Pty Limited (in liq) v Commissioner of Taxation* (2009) 239 CLR 346 at [23]-[29].

47. First, the class of persons to whom s254(1) applies is different and wider than the class of persons to whom s255 applies. The latter applies to persons who have receipt &c., of moneys belonging to non-residents where it is the non-resident who has derived IPG from a source in Australia, or where the non-resident is a shareholder &c., in a company deriving IPG from a source in Australia (collectively, "**controllers**"). By contrast, section 254(1) applies to all persons falling within the definitions of "trustees" and "agents" in the 1936 Act, including liquidators and receivers, who have derived IPG in a representative capacity.

48. Second, following from the first point, the relationship of trustees and agents to whom s254 applies with the IPG the subject of the tax is qualitatively different to the relationship of the controllers to whom s255 applies with the IPG the subject of that section. In the former case, it is the trustee or agent that has derived the IPG in their representative capacity, or by virtue of their agency. That is, the relationship of the trustee or agent with the IPG under s254 is direct. In the case of s255 the only necessary relationship of the controller with the IPG is that it is IPG derived by a non-resident or by a company in which a non-resident is a shareholder &c., in respect of which the controller has receipt &c., of moneys. The money held by the controller need not have any relationship with IPG derived by the non-resident or company the subject of the tax liability. In other words, under s255 the controller, and the money (s)he holds or controls, may be a complete stranger to the derivation of the IPG the subject of the tax.

49. Third, the point at which the obligations attach to agents or trustees under s254 is different to the point at which they attach to a controller under s255. Under the latter section, it is only when the tax of the non-resident has become "due and payable by the non-resident" under s255(1)(a) through an assessment of the non-resident that the controller can be required, by notice under s255 issuing to them, to pay the tax of the non-resident: *Bluebottle* at [77]. Under s254(1), the section engages at an earlier point in time; namely, at the point of derivation of the IPG by the agent or trustee, as provided by the chapeaux of s254(1). It is at that point, and by force of the section itself, that the requirements of pars. (a) and (b) attach to the trustee or agent.

50. Fourth, the nature of the obligations cast on an agent and trustee under s254 is qualitatively different from that which is cast on controllers under s255. As noted above, by making the agent or trustee "answerable as taxpayer" it casts on them a wide ranging responsibility to ensure assessment of, and payment of, the tax due in respect of the IPG they have derived in their representative capacity (see para [40]). As par. (b) of s254(1) makes clear, that responsibility stretches back before the time of the assessment of the IPG and includes the obligation to make returns and a liability to be assessed for the tax due in respect of the IPG. In contrast, s255 does not make the controller "answerable as taxpayer", oblige them to make returns or render them liable to assessment on the IPG relating to the non-resident. It merely obliges them, when required by notice under s255 issuing to them, to pay the tax that has been assessed to the non-resident.

51. Fifth, the subject of the retention obligation and authorization in s254(1)(d) is focused on the amount which is sufficient to pay tax which is or will become due in respect of the IPG derived by the agent or trustee in their representative capacity. Accordingly, as was pointed out in *Bluebottle* at [84], it is the amounts which the

agent or trustee deals with that establish the relevant taxation liability and mark its outer boundary. In contrast, under s255(1)(b) the retention obligation and authorization is addressed to the amount sufficient to pay the tax which is or will become due by the non-resident, and potentially comprehends the whole of the non-resident's taxation affairs for the relevant income year.

52. Sixth, as noted above (see para [43]), s254(1)(h) further assimilates the position of an agent or trustee deriving IPG in a representative capacity to that of a taxpayer by giving the Commissioner in respect of the IPG the remedies against the attachable property vested in or under the control, management or possession of the agent or trustee that he would have against the property of any other taxpayer. There is no similar provision in s255.

53. Seventh, in *Bluebottle* at [79] the Court observed with reference to s255 that "there is no reason to suppose that the controller of a non-resident's money would ordinarily, let alone invariably" have information to place them "in a position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives". In contrast, under s254 the position of the trustee (including receivers and liquidators)[22] and agent is likely to enable them to have, or acquire, a much greater familiarity with the taxation affairs of the beneficiary or principal. Section 254(1) assumes and requires such familiarity by obliging (in par. (b)) the trustee or agent to make returns in relation to the IPG derived in their representative capacity. Furthermore, as observed above, the focus of the retention obligation and authorization in s254(1)(d) is the amount sufficient to pay the tax in respect of the IPG. The agent or trustee would necessarily know the amount of IPG they have derived in their representative capacity. In contrast to s255(1)(b), it does not necessarily comprehend the whole of the beneficiary or principal's taxation affairs for the relevant income year.

54. It is, of course, an error to treat decisions on the construction of a phrase in one section as controlling the construction of the same or similar phrase in another section.[23] The Court recognized this in *Bluebottle* (see [92]-[93]). Critical to the construction of s255(1)(b) arrived at in *Bluebottle* was the intersection the Court observed at [82] between the obligation and authorization to retain in par. (b) and the obligation to pay in par. (a) of that section. Because the obligation to pay in s255(1)(a) is an obligation to, when required by notice under s255 issuing to them, pay amounts assessed to the non-resident and the obligation to retain in par. (b) intersected with, and was informed and given content by what was sufficient to meet that obligation, it followed, in the view of the Court, that the words "is or will become due" in par. (b) were to be construed as referring to tax assessed to the non-resident, although not yet payable (at [78]-[80]).

55. The primary judge (at PJ[22]) observed in s254 the same "intersecting obligation" to which the High Court referred in *Bluebottle*. While it is correct to say s254(1)(d) intersects and supports the obligations in s254(1)(a) and (b), those obligations (as

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[22] Under s477(3) of the Corps Act a liquidator is entitled to inspect at any reasonable time any books of the company. Under s431 of the Corps Act a controller of property of a corporation (including a receiver) is entitled to inspect at any reasonable time any books of the company.

[23] *Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [31]. *FCT v RCF IV* at [55].

observed in paras [48] – [50] above) are of a different and more comprehensive quality, arise at an earlier time and are imposed on persons who stand in a qualitatively different position in relation to the IPG the subject of tax as compared to those which are the subject of s255. Because the nature and timing of the obligations in s254(1)(a) and (b), with which par. (d) intersects and supports, are different to those in s255(1)(b), the point of intersection and the timing of engagement of the retention authorization and obligation in s254(1)(d) will be different to, and earlier than, that found by the Court in *Bluebottle*.

56. Moreover, the primary judge's observation (echoing *Bluebottle* at [78]) that content can be given to the obligation in s254(1)(d) only if an assessment has issued overlooks that, as was stated in *Bluebottle* at [84], the content of the obligations in s254(1)(a) and (b), and thus the obligation and authorization to retain in par. (d), is supplied (at least in outer boundary) by the amounts of IPG with which the agent or trustee deals, which they are required to return and on which they are liable to be assessed. They are not dependent, as in s255, on an assessment issued to another person for tax on IPG in relation to which the person the subject of the obligations may be a stranger.

Proper construction of s254(1)(d) of the 1936 Act:

57. For those reasons, both the primary judge and Davies J in the Full Court were in error in according s254(1)(d) the same construction given to s255(1)(b) by the Court in *Bluebottle* so as to restrict it to the period after an assessment has issued for the IPG. Rather, for the reasons which follow, the construction of s254(1)(d) stated at para [37] above should be preferred.

58. First, it is consistent with the ordinary meaning of the word "due" as recognized by all members of the Court in *Clyne v DCT*, that ordinary meaning being "owing" and not "presently payable".[24]

59. Second, a construction of the retention authorization and requirement in s254(1)(d) as arising on the derivation by the agent or trustee of IPG in a representative capacity is congruent with the nature and timing of the liability and obligations created by s254(1)(a) and (b) as discussed in paras [48] – [50] above. As seen above, those obligations arise on the derivation of the IPG by the agent or trustee and involve a general responsibility to ensure the return of that IPG, be assessed thereon and pay the tax in respect of the IPG derived in a representative capacity. That being the case, it is natural to expect that that obligation and authorization in s254(1)(d) would arise at the point those obligations arise and at the point which the IPG is derived.

60. Third, the Commissioner's proposed construction of s254(1)(d) is consistent with and promotes the purpose of the retention obligation and authorization in s254(1)(d) as described in para [42] above; namely, to facilitate the performance of the obligations in s254(1)(a) and (b) and enable and require the trustee or agent "to keep back out of the trust [or agency] receipts enough to pay the tax".[25] To construe the retention authorization and obligation in s254(1)(d) as only arising on the making of an assessment would be corrosive of that purpose because it would leave the trustee

[24] *Clyne v DCT* at 9-10 per Gibbs CJ, at 15 per Mason J (Aickin and Wilson JJ agreeing), at 24 per Brennan J.
[25] *Webb v Syme* at 497 per Barton J.

or agent vulnerable between the time of derivation of the IPG and the time of assessment to claims by the principal or beneficiary for payment over of the IPG and thus deny him or her the means to pay tax in respect of that IPG. It would do so in circumstances where the trustee or agent is obliged by s254(1)(a) and (b) to be answerable as taxpayer in respect of the IPG, ensure it is returned, be assessed on it and for payment of the tax thereon.

61. Fourth, the Commissioner's proposed construction of s254(1)(d) is consistent with, gives content to and promotes the purpose of the personal liability of the agent or trustee created by s254(1)(e). As noted in para [43] above, that personal liability is limited to the amounts retained or which should have been retained under par. (d) and serves to redress a circumstance of neglect by the agent or trustee of his or her representative obligations under par. (a) and (b). To construe the retention authorization and obligation in par. (d) as limited to the time after an assessment for the IPG has issued, and to leave the trust or agency receipts liable to being depleted between the time of the derivation of the IPG and an assessment, is to diminish the content of the potential personal liability of the agent or trustee under par. (e) by restricting the scope of the retention obligation in par. (d). It thus reduces the capacity of that personal liability to act as a spur to the performance of, and a redress of the neglect of, the obligations of the agent or trustee under par. (a) and (b) of s254.

62. Fifth, the Commissioner's construction is consistent with the legislative history of s254(1) of the 1936 Act.[26] Section 12(1)(c) of the 1895 Act contemplated an ongoing retention obligation by use of the words "retain from time to time in each year".[27] Section 52 of the 1915 Act (set out at FC[6]) and s89 of the 1922 Act also contemplated that the retention authorization and obligation in par. (e) antedated assessment by imposing, in par. (f), a personal liability on the agent or trustee in relation to money disposed of after the trustee or agent was required to make a return. That event would, almost invariably, precede an assessment. The re-enactment of those sections as s254 of the 1936 Act in slightly different terms was intended to *preserve* the scope of the retention obligation (commencing from the point of derivation) but *expand* the scope of the personal liability imposed in support of such obligation.

63. Sixth, there is no "impracticality, difficulty or absurdity"[28] in the construction of s254(1)(d) for which the Commissioner contends. The primary judge (at PJ[23]) and Fraser JA in *DCT v Barkworth Olives* at [29] placed emphasis on an apprehended absence of certainty at the time of derivation and prior to an assessment of what amount of tax liability may ultimately arise and, therefore, what amount was required to be retained under par. (d). This uncertainty was conceived to create difficulty or impracticality that militated against the Commissioner's construction.

64. However, with respect, this analysis overlooks the following matters:

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[26] As to legislative history as part of the context for statutory interpretation see: *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22] and [30].

[27] See *Webb v Syme* at 490.

[28] *FCT v RCF IV* at [2] per Allsop CJ.

(a) as noted in *Bluebottle v DCT* at [84], in the case of s254(1), it is the "amounts which the agent [or trustee] dealt with that both found the relevant taxation liability and mark[...] the outer boundary of that liability";

(b) an agent or trustee, upon the derivation of the IPG, will be in a position to ascertain what amount will be "sufficient to pay the tax which is or will become due in respect of the IPG" by applying the relevant marginal tax rate to the amount of IPG which they have derived. Where the relevant marginal tax rate is the corporate tax rate, ascertaining the outer boundaries of the agent's retention obligation and authorization involves a straightforward application of that tax rate to the amount of the IPG with which the agent or trustee deals;[29]

(c) the content of the obligation of the agent or trustee under par. (d) is to retain an amount *sufficient* to pay the tax *in respect of the IPG.* The concept of sufficiency does not import nominal equivalence.[30] To the same effect, Latham CJ observed in a cognate context, "the sum that is set aside in pursuance of the statute may not prove to be the sum that is actually payable".[31] In other words, it is not necessary in order for an agent or trustee to retain an amount *sufficient* to pay the tax *in respect of the IPG* from the time of derivation to know with precision the principal or beneficiary's ultimate net tax liability for the whole of the income year; and

(d) if, at the time of or following the derivation of the IPG, an agent or trustee knows or becomes aware of allowable deductions or losses of the beneficiary, principal or company which will reduce the amount of tax payable on the IPG, the amount retained by the agent or trustee can be adjusted accordingly. This is because amounts in excess of that will be more than what is sufficient to pay the tax in respect of the IPG.

65. At FC[18] Edmonds J rejected the prospect of a trustee being required to retain moneys received by further settlement to pay tax to be assessed in the future. However, in circumstances where a trustee has derived IPG on which tax will become due upon assessment and does not retain sufficient out of the IPG to meet that taxation liability, it is unsurprising that the trustee is required to retain out of further moneys settled on him or her for the benefit of the beneficiary primarily liable for the tax in respect of the IPG sufficient to meet the taxation liability in respect of the IPG. Such a result is consistent with what Barton J in *Webb v Syme* (at 497) saw as the purpose of the retention obligation and authorization; namely, to

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[29] Where there is an individual beneficiary or principal and the agent or trustee did not know and could not ascertain the relevant marginal tax rate, (s)he would prudently retain an amount equal to the top marginal tax rate. In *Australian Securities and Investment Commission v Lanepoint Enterprises Pty Limited* [2006] FCA 1493; (2006) 64 ATR 524 at [52]-[58] (appeal allowed on other grounds in [2007] FCAFC 85; (2007) 62 ACSR 708) and *Goldana Investments Pty Limited (Recs & Mrs apptd) v National Mutual Life Nominees Ltd* [2011] NSWSC 1334 at [60]-[85] it was held that receivers were entitled to retain funds from the sale of assets to meet apprehended, but unassessed tax liabilities under s254 of the 1936 Act.

[30] *FCT v RCF IV* at [11] per Allsop CJ.

[31] *Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 288 concerning s59 of the 1922 Act, now found in sub-divisions 260-B and s260-C of Schedule 1 the *Taxation Administration Act 1953* (Cth).

enable and require the trustee to "keep back out of the trust receipts enough to pay the tax".

66. In short, the retention obligation in s254(1)(d) operates "from time to time": the critical point for the trustee or agent who wishes to observe his or her obligations and avoid personal liability arises at the stage of potential distribution of relevant funds to the beneficiary or principal. At that point he or she will hold back sufficient to ensure that the tax, whether yet assessed or not, can be met from an available fund if the beneficiary or principal does not do so.

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Taxpayer's obligation in respect of income derived during an income year:

67. At FC[19] – [20] Edmonds J stated, as a matter pointing against the construction of s254(1)(d) of the 1936 Act for which the Commissioner contends, that no tax liability could arise in ABS or the Liquidators in respect of the capital gain arising from the sale of the Crestmead property until the end of the relevant income year. This prevented, in his Honour's view, it being said at the point of the sale of the Crestmead property that any amount of tax is or will become due in respect of the capital gain derived from that disposal.

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68. While tax is due, in the sense of owing, only after it is assessed,[32] taxpayers have an *obligation* to pay tax on income derived during the course of an income year. This is so even though income tax is usually assessed annually, a taxpayer's net tax liability for an income year may not be ascertainable until the end of the year and the tax liability does not mature into a debt due and payable until an assessment is issued. This obligation underlies the Commissioner's power in s168 of the 1936 Act to issue assessments in respect of part only of an income year and the Commissioner's ability to lodge a proof of debt in the bankruptcy of a taxpayer who becomes a bankrupt during an income year.[33]

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69. Therefore, contrary to the statement of Edmonds J at FC[19]-[20], it can be correctly said that, following the sale of the Crestmead property and before the end of the relevant income year, ABS had an obligation or liability to pay income tax on the capital gain arising from that CGT event by the inclusion of that capital gain in ABS's calculation of its net capital gain and thereby its assessable income. This is so even though that liability was subject to reduction by the application of any present or future available capital losses under s102-5(1) of the 1997 Act and even though that liability would not mature into a debt due and payable until an assessment was issued.

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70. Furthermore, and in any event, none of the matters referred to by Edmonds J at FC[19]-[20] (even if correct), create any difficulty in construing s254(1)(d) of the 1936 Act as authorizing and requiring an agent or trustee who has derived IPG in a representative capacity to retain, from the time of derivation, an amount sufficient to pay tax in respect of the IPG which will become due in the future. The future tense in the words "will become due" clearly indicate that s254(1)(d) is directed to tax liabilities which mature into debts due and payable in the future.

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[32] *Clyne v DCT* at 17 per Mason J (Aickin, Wilson and Brennan JJ agreeing). Compare the views of Gibbs CJ at 9.

[33] *Commissioner of Taxation v Jones* (1999) 86 FCR 282 at [18] – [21] [34] per Hill, Sackville and Hely JJ.

Part VII: Legislation

71. The primary legislation with which the appeal is concerned is as follows. The historical antecedents are provided in a separate bundle filed with these submissions.

Income Tax Assessment Act 1936 (Cth), s6(1) (definition of "agent" and "trustee"), Part III, Div 6, s168, s254, s255.

Income Tax Assessment Act 1997 (Cth), s102-5, s104-10, s106-35 and s960-105.

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Part VIII: Orders

72. The Appellant seeks the following orders:

(a) Appeal allowed.

(b) Set aside the orders of the Full Court of the Federal Court made on 8 October 2014 and, in lieu thereof, order that the orders of the primary judge of 21 February 2014 be set aside.

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(c) The matter be remitted to the primary judge for the determination of the issue identified at [13(a)] of the reasons of the primary judge.

(d) Noting that the Appellant has made a decision to provide funding under the ATO Test Case Litigation Program, the Appellant pay the Respondent's costs of the appeal as agreed or as assessed on a party / party basis.

Part IX: Estimate

30 73. The Commissioner estimates that it will take two hours for the presentation of its oral argument in chief.

Dated: 22 May 2015

JT Gleeson SC	**NJ Williams SC**	**MJ O'Meara**
Solicitor-General of the Commonwealth	**Sixth Floor, Selborne/ Wentworth Chambers**	**Sixth Floor, Selborne/ Wentworth Chambers**

Annexure

Part VII: Legislation

***Income Tax Assessment Act 1936* (Cth) (as at the relevant time)**

Section 6 (definitions of "agent" and "trustee")

Definition of "agent"
Agent: this Act applies to some entities (within the meaning of the *Income Tax Assessment Act 1997*) that are not agents in the same way as it applies to agents: see section 960-105 of the *Income Tax Assessment Act 1997*.

Definition of "trustee"
Trustee in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, includes:
(a) an executor or administrator, guardian, committee, receiver, or liquidator; and
(b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability.

Section 168 Special assessment

(1) The Commissioner may at any time during any year, or after its expiration, make an assessment of the taxable income derived (or that there is no taxable income) in that year or any part of it by any taxpayer, and of the tax payable thereon (or that no tax is payable).

(2) Where the income, in respect of which such an assessment is made, is derived in a period less than a year, the assessment shall be made as if the beginning and end of that period were the beginning and end respectively of the year of income.

Section 254 Agents and trustees

(1) With respect to every agent and with respect also to every trustee, the following provisions shall apply:
   (a) He or she shall be answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of the income, or any profits or gains of a capital nature, derived by him or her in his or her representative capacity, or derived by the principal by virtue of his or her agency, and for the payment of tax thereon.
   (b) He or she shall in respect of that income, or those profits or gains, make the returns and be assessed thereon, but in his or her representative capacity only, and each return and assessment shall, except as otherwise provided by this Act, be separate and distinct from any other.
   (c) If he or she is a trustee of the estate of a deceased person, the returns shall be the same as far as practicable as the deceased person, if living, would have been liable to make.
   (d) He or she is hereby authorized and required to retain from time to time out of any money which comes to him or her in his or her representative capacity so much as

is sufficient to pay tax which is or will become due in respect of the income, profits or gains.

(e) He or she is hereby made personally liable for the tax payable in respect of the income, profits or gains to the extent of any amount that he or she has retained, or should have retained, under paragraph (d); but he or she shall not be otherwise personally liable for the tax.

(f) He or she is hereby indemnified for all payments which he or she makes in pursuance of this Act or of any requirement of the Commissioner.

(g) Where as one of 2 or more joint agents or trustees he or she pays any amount for which they are jointly liable, each other one is liable to pay him or her an equal share of the amount so paid.

(h) For the purpose of insuring the payment of tax the Commissioner shall have the same remedies against attachable property of any kind vested in or under the control or management or in the possession of any agent or trustee, as the Commissioner would have against the property of any other taxpayer in respect of tax.

(2) Subsection (1) applies to the following in the same way as it applies to tax:

(a) the general interest charge under:

(i) section 163AA, former section 170AA, former subsection 204(3), former subsection 221AZMAA(1), former subsection 221AZP(1), former subsection 221YD(3) or former section 221YDB of this Act;

(ii) section 5-15 of the *Income Tax Assessment Act 1997*;

(b) additional tax under former Part VII of this Act;

(c) shortfall interest charge.

Note 1: The general interest charge is worked out under Part IIA of the *Taxation Administration Act 1953* and shortfall interest charge is worked out under Division 280 in Schedule 1 to that Act.

Note 2: Subsection 8AAB(4) of that Act lists the provisions that apply the general interest charge.

(3) In paragraphs (1)(d) and (e), and in its first occurrence in paragraph (1)(h), tax includes, in addition to the things mentioned in subsection (2):

(a) trustee beneficiary non-disclosure tax within the meaning of Division 6D of Part III; and

(b) general interest charge payable under section 102UP in respect of such tax.

Section 255 Person in receipt or control of money from non-resident

(1) With respect to every person having the receipt control or disposal of money belonging to a non-resident, who derives income, or profits or gains of a capital nature, from a source in Australia or who is a shareholder, debenture holder, or depositor in a company deriving income, or profits or gains of a capital nature, from a source in Australia, the following provisions shall, subject to this Act, apply:

(a) the person shall when required by the Commissioner pay the tax due and payable by the non-resident;

(b) the person is hereby authorized and required to retain from time to time out of any money which comes to the person on behalf of the non-resident so much as is sufficient to pay the tax which is or will become due by the non-resident;
(c) the person is hereby made personally liable for the tax payable by the person on behalf of the non-resident to the extent of any amount that the person has retained, or should have retained, under paragraph (b); but the person shall not be otherwise personally liable for the tax;
(d) the person is hereby indemnified for all payments which the person makes in pursuance of this Act or of any requirement of the Commissioner.

(2) Every person who is liable to pay money to a non-resident shall be deemed to be a person having the control of money belonging to the non-resident, and, subject to subsection (2A), all money due by the person to the non-resident shall be deemed to be money which comes to the person on behalf of the non-resident.

(2A) For the purposes of this section, money due by a person to a non-resident from which an amount must be withheld under section 12-325 in Schedule 1 to the Taxation Administration Act 1953 (about natural resource payments) or Subdivision 12-H in that Schedule (about distributions to foreign residents from managed investment trusts) shall be deemed not to be money which comes to the person on behalf of the non-resident.

(3) Where the Commonwealth, a State or an authority of the Commonwealth or a State has the receipt, control or disposal of money belonging to a non-resident, this section (other than paragraph (1)(c)) applies to and in relation to the Commonwealth, the State or the authority, as the case may be, in the same manner as it applies to and in relation to any other person.

(4) This section applies to the following in the same way as it applies to tax:
(a) the general interest charge under:
(i) section 163AA, former section 170AA, former subsection 204(3), former subsection 221AZMAA(1), former subsection 221AZP(1), former subsection 221YD(3) or former section 221YDB of this Act;
(ii) section 5-15 of the *Income Tax Assessment Act 1997*;
(b) additional tax under former Part VII of this Act;
(c) shortfall interest charge.

Note 1: The general interest charge is worked out under Part IIA of the *Taxation Administration Act 1953* and shortfall interest charge is worked out under Division 280 in Schedule 1 to that Act.

Note 2: Subsection 8AAB(4) of that Act lists the provisions that apply the general interest charge.

(5) This section applies to an equity holder in the same way as it applies to a shareholder.

Income Tax Assessment Act 1997 **(Cth) (as at the relevant time)**

Section 102-5 Assessable income includes net capital gain

(1) Your assessable income includes your net capital gain (if any) for the income year. You work out your ***net capital gain*** in this way:

Working out your net capital gain

Step 1. Reduce the *capital gains you made during the income year by the *capital losses (if any) you made during the income year.

Note 1: You choose the order in which you reduce your capital gains. You have a net capital loss for the income year if your capital losses exceed your capital gains: see section 102-10.

Note 2: Some provisions of this Act (such as Divisions 104 and 118) permit or require you to disregard certain capital gains or losses when working out your net capital gain. Subdivision 152-B permits you, in some circumstances, to disregard a capital gain on an asset you held for at least 15 years.

Step 2. Apply any previously unapplied *net capital losses from earlier income years to reduce the amounts (if any) remaining after the reduction of *capital gains under step 1 (including any capital gains not reduced under that step because the *capital losses were less than the total of your capital gains).

Note 1: Section 102-15 explains how to apply net capital losses.

Note 2: You choose the order in which you reduce the amounts.

Step 3. Reduce by the *discount percentage each amount of a *discount capital gain remaining after step 2 (if any).

Note: Only some entities can have discount capital gains, and only if they have capital gains from CGT assets acquired at least a year before making the gains. See Division 115.

Step 4. If any of your *capital gains (whether or not they are *discount capital gains) qualify for any of the small business concessions in Subdivisions 152-C, 152-D and 152-E, apply those concessions to each capital gain as provided for in those Subdivisions.

Note 1: The basic conditions for getting these concessions are in Subdivision 152-A.

Note 2: Subdivision 152-C does not apply to CGT events J2, J5 and J6. In addition, Subdivision 152-E does not apply to CGT events J5 and J6.

Step 5. Add up the amounts of *capital gains (if any) remaining after step 4. The sum is your ***net capital gain*** for the income year.

Note: For exceptions and modifications to these rules: see section 102-30.

(2) However, if during the income year:

(a) you became bankrupt; or

(b) you were released from debts under a law relating to bankruptcy;

any *net capital loss you made for an earlier income year must be disregarded in working out whether you made a *net capital gain for the income year or a later one.

(3) Subsection (2) applies even though your bankruptcy is annulled if:
  (a) the annulment happens under section 74 of the *Bankruptcy Act 1966*; and
  (b) under the composition or scheme of arrangement concerned, you were, will be or may be released from debts from which you would have been released if instead you had been discharged from the bankruptcy.

Section 104-10 Disposal of a CGT asset: CGT event A1

(1) ***CGT event A1*** happens if you *dispose of a *CGT asset.

(2) You ***dispose of*** a *CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. However, a change of ownership does not occur if you stop being the legal owner of the asset but continue to be its beneficial owner.

Note: A change in the trustee of a trust does not constitute a change in the entity that is the trustee of the trust (see subsection 960-100(2)). This means that CGT event A1 will not happen merely because of a change in the trustee.

(3) The time of the event is:
  (a) when you enter into the contract for the *disposal; or
  (b) if there is no contract—when the change of ownership occurs.

Example: In June 1999 you enter into a contract to sell land. The contract is settled in October 1999. You make a capital gain of $50,000.

The gain is made in the 1998-99 income year (the year you entered into the contract) and not the 1999-2000 income year (the year that settlement takes place).

Note 1: If the contract falls through before completion, this event does not happen because no change in ownership occurs.

Note 2: If the asset was compulsorily acquired from you: see subsection (6).

(4) You make a ***capital gain*** if the *capital proceeds from the disposal are *more* than the asset's *cost base. You make a ***capital loss*** if those capital proceeds are *less* than the asset's *reduced cost base.

Exceptions

(5) A *capital gain or *capital loss you make is disregarded if:
  (a) you *acquired the asset before 20 September 1985; or
  (b) for a lease that you granted:
    (i) it was granted before that day; or
    (ii) if it has been renewed or extended—the start of the last renewal or extension occurred before that day.

Note 1: You can make a gain if you dispose of shares in a company, or an interest in a trust, that you acquired before that day: see CGT event K6.

Note 2: A capital gain or loss you make because you assign a right under or in relation to a general insurance policy you held with an HIH company to the

Commonwealth, the trustee of the HIH Trust or a prescribed entity is also disregarded: see section 322-15.

Note 3: A capital gain or loss made by a demerging entity from CGT event A1 happening as a result of a demerger is also disregarded: see section 125-155.

Note 4: A capital gain or loss you make because of section 16AI of the *Banking Act 1959* is disregarded: see section 253-10 of this Act. Section 16AI of the *Banking Act 1959*:

(a) reduces your right to be paid an amount by an ADI in connection with an account to the extent of your entitlement under Division 2AA of Part II of that Act to be paid an amount by APRA; and

(b) provides that, to the extent of the reduction, the right becomes a right of APRA.

Note 5: A capital gain or loss you make because, under section 62ZZL of the *Insurance Act 1973*, you dispose of a CGT asset consisting of your rights against a general insurance company to APRA is disregarded: see section 322-30 of this Act.

Compulsory acquisition

(6) If the asset was *acquired from you by an entity under a power of compulsory acquisition conferred by an *Australian law or a *foreign law, the time of the event is the earliest of:

(a) when you received compensation from the entity; or

(b) when the entity became the asset's owner; or

(c) when the entity entered it under that power; or

(d) when the entity took possession under that power.

Note: You may be able to choose a roll-over if an asset is compulsorily acquired: see Subdivision 124-B.

(7) ***CGT event A1*** does not happen if the *disposal of the asset was done:

(a) to provide or redeem a security; or

(b) because of the vesting of the asset in a trustee under the *Bankruptcy Act 1966* or under a similar *foreign law; or

(c) because of the vesting of the asset in a liquidator of a company, or the holder of a similar office under a foreign law.

Section 106-35 Effect of liquidation

This Part and Part 3-3 apply to an act done by a liquidator of a company, or the holder of a similar office under a *foreign law, as if the act had been done instead by the company.

Example: Ben, a liquidator of a company, sells a CGT asset of the company. Any capital gain or loss is made by the company, not by Ben.

Section 960-105 Certain entities treated as agents

(1) This Act applies to an entity as if the entity were an agent of another entity (the principal) if:

(a) the principal is outside Australia; and

(b) the entity is in Australia and, on behalf of the principal, holds money of the principal or has control, receipt or disposal of money of the principal.

(2) This Act, or a provision of this Act, applies to an entity as if the entity were an agent of another entity if the Commissioner determines in writing that the entity is the agent or sole agent of the other entity for the purposes of this Act or of that provision.

(3) A determination under subsection (2) is not a legislative instrument.