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

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
ACN 094 238 678 (IN LIQUIDATION)
Respondents

RESPONDENTS' SUBMISSIONS

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Filed on behalf of the respondents

Part I:

1. The respondents certify that this submission is in a form suitable for publication on the internet.

Part II:

2. Except for the two qualifications set out below, the respondents agree that the appeal raises the issues set out in paragraph 2 of the appellant's submissions.

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3. *First*, the issue directly raised by the *orders* of the Full Court of the Federal Court is the issue listed at paragraph 2(c) of the appellant's submissions. The appellant correctly records that the respondents do not seek to uphold the decision below on the basis of the reasoning said to give rise to issues 2(a) and 2(b).

4. *Second*, the way in which issue 2(c) is identified in the appellant's submissions is incomplete. The issue should be more accurately described as follows (suggested alteration highlighted):

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> "*Whether, following the derivation by a trustee or agent of IPG in a representative capacity, but prior to an assessment of 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 which is or will become due*** *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*"

30 **Part III:**

5. The respondents certify that they have considered whether any notice should be given in compliance with section 78B of the *Judiciary Act* 1903 (Cth) and that no such notice needs to be given.

Part IV:

6. The respondents do not contest any of the material facts set out in the appellant's submissions. The respondents do not accept that the first of the

40 issues identified by Logan J corresponded with question 1 posed in the

application for a private ruling (appellants outline at [12]) but given it was not decided by Logan J and is not the subject of this appeal it is unnecessary to further address this.

Part V:

7. The respondents accept the appellant's statement of applicable statutes. The principal statute referred to is the *Income Tax Assessment Act* 1936 (Cth) ("the Act" or "the 1936 Act").

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Part VI:

Response re 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?

8. The respondents do not make any submissions in respect of this issue.

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

9. The respondents do not make any submissions in respect of this issue.

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

The Proper Construction of s 254(1)(d)

30 10. The primary issue requires the determination of the scope of operation of s 254(1) (d), read, of course, in the context of the section and indeed the Act as a whole.

11. The respondents submit that section 254(1)(d) is to be construed:

a. Such that the expression '*so much as is sufficient to pay tax which is or will become due in respect of the income, profit or gains*' is to be understood as referring to the sum assessed as owing and then payable or to become payable;

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b. accordingly, so it operates only upon an assessment being issued.

12. Such a construction means that:

a. the relevant retention permission and obligation expressed in s 254(1)(d); and

b. the personal liability in s 254(1)(e) which is dependent upon the operation of ss (d),

will be construed and operate in the same way as the analogue provisions in s 255 as interpreted by this Court in *Bluebottle UK Limited –v- Commissioner of Taxation* (2007) 232 CLR 598 ("*Bluebottle*").

Is or will become due

13. By section 254(1) (d) the agent[1] is authorised and required to retain money. And by section 254(1) (e) the agent's personal liability is defined by the extent of that obligation (namely limited to the extent of the amount the agent has or should have retained under (d)).

14. The authorisation and requirement of s 254(1) (d) is to retain '*so much as is sufficient to pay tax which is or will become due in respect of the income, profit or gains*'. Generally in these submissions the respondents will refer to the obligation in s 254(1) (d) as "the retention obligation".

15. The subsection is not satisfied by identifying tax which might become due (whatever content is given to the word 'due'). Rather what is referred to is tax which is, or which will (not may) become due. While it can be said that someone who derives '*income, or any profits or gains of a capital nature*' will have to include that component in assessable income, and that there might become a sum of tax due, it cannot be said that such a sum will become due merely by force of the deriving of that '*income, or any profits or gains of a capital nature*'.

16. The expression 'tax which is or will become due' requires for its operation the certainty which is obtained by an assessment being issued. Upon the issue of the assessment, tax is owing and it is then possible to identify whether it is then

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[1] For convenience in these submissions the respondents will refer simply to agents, while acknowledging the section also refers to trustees.

payable or will become payable at some point. This is an appropriate way to construe the word 'due' in the composite expression 'tax which is or will become due' even though due may in different contexts be used to refer to sums in fact owing and payable.

17. Contrary to the submissions by the appellant, there are sound practical reasons why s 254(1) (d) ought to be construed in the way the respondents contend. They are expanded on later in these submissions, but include the following:

10 a. Absent an assessment, the identification of the amount 'sufficient to pay' is uncertain and perhaps unascertainable;

b. A retention obligation which applied whenever the agent derived income, profits or a gain would impose an impracticable task on at least certain kinds of agents or trustees to whom s 254 is directed.

Sufficient to pay

18. The retention obligation imposed by s 254(1) (d) is delineated by reference to an amount which '*is sufficient to pay tax which is or will become due*'. Of
20 course it is possible to estimate (to varying degrees of reliability) what the tax may be at any moment. But the amount can only (or most usually can only) be known when an assessment has issued.

19. The language used supports the respondents' construction. The retention obligation is not expressed in terms of retaining the sum estimated to be sufficient. Rather what is referred to is a sum sufficient to pay the tax.

20. The appellant suggests the section identifies the 'outer bounds' of the obligation in substance because:

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a. It is an obligation to 'retain' money and accordingly is limited to the amount in fact passing into the agent's hands; and

b. It would be possible to calculate the tax on the maximum marginal rate of tax (corporate or personal as the case may be).

21. Doing either of these (putting aside the possibility of penalty tax) would ensure that at least a sufficient amount was retained to pay tax which is or will become

due. But doing so is also capable to leading to the retention of more than sufficient to do so.

22. There is no warrant in the language for permitting or requiring the agent to do so.

    a. Had Parliament intended such an outcome it would have been able readily to extend the retention obligation (and permission) to such sum as the agent estimated was sufficient or some other like formula. But of course to do so would possibly prejudice the revenue if the agent reasonably but erroneously estimated too low a sum.

    b. Rather the criteria selected (the amount sufficient to pay the tax) is employed in the section not only to impose the obligation to retain (and the liability which follows from that) but also to define the limit of the permission to withhold the money from the principal. A natural person principal with no other income (or perhaps losses) would feel aggrieved if the agent withheld from him the top marginal rate of tax relying on the operation of s 254(1)(d). The language in the section does not authorise the withholding of more than is sufficient to pay the tax which is or will become due. The top marginal rate will never become due in the circumstances presently postulated.

23. In this regard the appellant contends (at [64(c)]) that:

> "[T]*he 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."*

24. The authority cited for that proposition is *Commissioner of Taxation –v- Resource Capital Fund IV Ltd* (2013) 215 FCR 1, at [11] per Allsop CJ. That case concerned whether the reference to 'money' in s255 was confined to Australian currency or whether it extended to include foreign currency. His Honour held there was no reason to limit the reference to money to Australian dollars. His Honour continued:

> *"If, at some time, ("from time to time") the controller wants to repatriate or is called upon to repatriate money, it will be obliged and entitled to retain (to keep in its hands or keep back) so much of the money as is sufficient to pay the tax. If the money is in Australian dollars, the relevant nominal sum needs to be held back. If the money is in foreign*

> *currency, so much of it must be retained as is sufficient to pay the tax. Given that the tax is payable in Australian dollars, the amount (in foreign currency) to be retained is to be assessed by reference to prevailing exchange rates. The phrase "as is sufficient" does not require a nominal equivalence of money in Australian dollars. Once the amount of foreign currency to be retained is calculated, the balance may be remitted."* (underlining added)

25. In its proper context, Allsop CJ is not suggesting that the phrase '*as is sufficient*' requires something less than the certainty of an assessment. The passage relied on by the appellant has been taken divorced of its context. Otherwise the reasoning in the decision is supportive of the respondents' contentions. Here the expression *'as is sufficient'* provides not authorisation or obligation to retain any more than the sum which is or will become payable as tax.[2]

The Adjustment proposition

26. A further aspect of the appellant's 'outer limit' approach to the section is its submission (at [64(d)]) that the amount retained can be adjusted if the agent becomes aware of the existence of losses or deductions.

27. Again that might well be a sensible approach but not one which can be reconciled with the language used in the section. Section 254(1)(d) authorises and requires the agent 'to retain from time to time out of any money which comes' to the agent sufficient to pay the tax . The ambulatory language is directed to the retaining from time to time. It is not directed to the identification 'from time to time' of the amount which is sufficient to pay the tax.

28. But on the appellant's construction what is called up by the section is an obligation (said to be of variable content) which is dependent on the agent's state of knowledge from time to time, or perhaps the level of satisfaction the agent may have as to the existence of losses or deductions. There is no language in the section which introduces such a subjective element.

29. In support of its submission, the appellant (also in paragraph [64c]) refers to words of Latham CJ said to be *'in a cognate context'*, namely:

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2 See Gordon J at [38], [41], with Allsop CJ (at [1]) and Jagot J (at [57]) agreeing.

> *"the sum that is set aside in pursuance of the statute may not prove to be the sum that is actually payable."*

30. That passage is of no assistance to the construction of s 254. The context was materially different. *Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 concerned what are now the provisions in s260 of Schedule 1 to the TAA 1953. Those provisions (at the time) required the Liquidator to '*set aside such sum out of the assets of the company as appears to the commissioner to be sufficient to provide for any tax that then is or will thereafter become payable*'. It was in that context that Latham CJ said:

> *"The statutes do not require the commissioner to specify some precise amount of tax as being due. Indeed, the sections relate not only to tax that then is payable but also to tax which "will thereafter become payable." It is, therefore, evident that the sum to be set aside in pursuance of the statutes may prove not to be the sum that is actually payable."*

31. The subjective qualification which was present in the section his Honour was considering ('*as appears to the commissioner to be sufficient*') is absent from s254. Moreover, the section was concerned with a sum specified by the commissioner, and not, as in s 254, an obligation which was not specified at all save by the language of the section.

The Intersection of the Obligations in s 254(1) More Broadly

32. The appellant points to other paragraphs of s 254(1) as informing its approach to the primary issue and as bases for distinguishing the approach taken by this Court in *Bluebottle.*

33. *Section 254(1)(a)*: By this paragraph, the agent is made answerable as taxpayer for doing all things required under the Act in respect of the income profits or gains and for the payment of the tax thereon.

    a. This operates harmoniously with the respondents' construction of the section. The agent is responsible for (amongst other things no doubt) maintaining records, the lodgement of BAS (if appropriate), the lodgement of a tax return and the payment of the tax. A taxpayer of course will be subject to taxation obligations ahead of the issue of an assessment and this subsection seeks to impose those on the agent. The one requirement singled out for specific mention is the obligation for '*payment of the tax*

thereon'. If, as the appellant urges, the effect of this subsection is to align the position of the agent with that of the principal, that would lead to an obligation to pay the sum as and when required by an assessment.

b. This provision, however, is not the source of the retention obligation nor does it identify the relevant limit on the agent's personal liability. The only obligation to retain money is in ss (d) and the limit of the personal liability is in ss (e).

c. Both ss (d) and (e) postulate that there is some liability to pay tax (and in the respondents' submission that can be said to arise from ss (a) or perhaps other provisions of the Act) but then provide a specific limitation on the extent of the personal liability and the retention permission and obligation.

d. Accordingly the operation of s 254(1)(a) in making the agent answerable as taxpayer is itself subject to the limitation in ss(1)(d) and (e), and affords no basis for adopting an expansive construction of the latter.

34. *Section 254(1)(b)*: This paragraph does not add materially to the points discussed in relation to s 254(1)(a). It clarifies that an agent must make returns and be assessed in each representative capacity.

35. The expression '*in respect of the income, or any profits or gains of a capital nature*' (or its close equivalent) is used in each of ss 254(1)(a), (b), (d) and (e).

36. Section 254(1)(a) makes the agent answerable as taxpayer '*in respect of the income, or any profits or gains of a capital nature*'. The income, or any profits or gains of a capital nature in respect of which the agent is so answerable is that derived by the agent in his or her representative capacity (or by the principal).

37. Generally a taxpayer is liable to include all non-exempt income, profits and capital gains in its assessable income in its return: see Part 1-3 of the *Income Tax Assessment Act* 1997 (Cth). But s 254(1)(b) makes it clear that each representative capacity is to be treated distinctly and the return made accordingly. Usually (absent the exercise of the eccentric power of the Commissioner under s 168 of the 1936 Act) the return is to be provided annually.

38. The common expression (the income, or any profits or gains of a capital nature) is one which is apposite to describe the whole of the product of the agent's activity in the particular representative capacity. It cannot be supposed (and the appellant does not contend) that the agent is to provide a return and be assessed for each item of income derived in the particular representative capacity as distinct from all of the income so derived. The same is true for profits and gains. Indeed often to identify an activity (representative or otherwise) as one which produces income or one which produces a profit requires consideration of the conduct of the activity over a period; not each transaction isolated from others.

39. The structure of s 254(1)(a) and (b) suggests that (with the qualifications that the returns and assessments are to be made in a representative capacity, and that each representative capacity is to be treated separately) the position of the agent is to be assimilated with that of a taxpayer who derived that income, profits or gains. Such a person would be assessed (usually annually) on the income, profits and gains so derived.

40. Such an approach makes it difficult to construe the same language ('*in respect of the income, or any profits or gains of a capital nature*') when used in each of sections 254(1)(d) and 254(1)(e) as referring to an individual transaction and not the composite position which is reflected in an assessment of the tax due on the income, profits and gains derived in that representative capacity.

41. *Section 254(1)(h)*: This subsection serves to reinforce the assimilation of the position of the agent with that of taxpayers generally and is thus consistent with the construction urged by the respondents.

Identified Differences with s 255

42. The appellant points to a series of asserted material differences between s 254 and s 255. A number have been dealt with above. Some remain to be considered.[3] A number of the points relied on by the appellant are directed to establishing that which is uncontroversial: namely that the two sections do not cover precisely the same field. They do operate in different circumstances (though they may in some case overlap so as to both operate). However, the

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[3] The fifth point relied on by the appellant (as set out paragraph [51] of its submissions) concerning the meaning of the reference to an amount 'sufficient to pay' has been discussed above at paragraphs 18 to 25. The sixth issue set out in the appellant's outline at [52] is dealt with above at paragraph 41.

central issue is how the retention obligations in the two sections apply. They are expressed in virtually identical terms. Those terms (as discussed above in relation to s 254(1)(d)) point in favour of the construction urged by the respondents. It is also the approach taken in *Bluebottle* to the construction of the retention obligation in s 255. The areas of distinction pointed to by the appellant are not material to that construction.

43. *The Class of Persons affected*:[4] It is not at all clear that the class of persons to whom s 254 is directed is (as submitted by the appellant) wider than the class to whom s 255 applies. The language used in the latter is '*every person having the receipt control or disposal of money belonging to a non-resident...*' . The former is expressed to apply to 'every agent' and 'also to every trustee'.

44. However, it may be accepted that the two sections operate in relation to different particular circumstances. Indeed if that were not so, one of them would be redundant. But what is of central significance in this appeal is not to ambit of the particular circumstances captured by the sections but rather the proper scope of the retention obligations.

45. *The Intimacy Issue*:[5] One feature of s 254(1)(a) upon which the appellant relies to distinguish it from s 255(1) is that the occasion for its operation is the deriving by the agent (or by the principal by virtue of the agency) of income, profits or gains. Thus it is said s 254(1) is enlivened in a situation where the agent will be involved in and know of the deriving of the relevant income, profits or gain. On the other hand, s 255(1) may operate (though not exclusively so) where there is no connection between the money held by the agent and the income, profits or gains derived by the principal.

46. This is then relied on by the appellant (at [53]) as a point of distinction with s 255 in light of the discussion in *Bluebottle.* In *Bluebottle* the court said (of s 255) at [79]:

> *"The prediction that tax may be due (and any prediction of its likely amount) may be able to be made with more or less certainty by a person who is armed with a deal of information, but there is no reason to suppose that the controller of a non-resident's money would ordinarily, let alone invariably, have that information and be in a*

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4 This is the first of the points mentioned in the Appellant's outline at [47].

5 This covers the second and seventh points mentioned in the Appellant's outline at [48] and [53].

position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives."

47. It is possible that an agent under s 254 may have, or be in a position to acquire, a greater familiarity with the taxation affairs of the beneficiary or principal, then perhaps would be a person subject to an obligation under s 255(1). The appellant points to s 477(3) and s431 of the *Corporations Act* 2001 (Cth) to support the proposition that liquidators and receivers are in a good position to be appraised of the company's taxation affairs. However, the same cannot be said for any number of agents to whom s 254 applies, for example:

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a. agents responsible for selling stock on behalf of principals (and therefore receiving the monies from that sale). They will not necessarily have access to the financial information for their principals (and one can envisage situations in which the principals would not want their agents to have such information). That could include, for example, livestock agents responsible for selling cattle or sheep, agents responsible for selling collectibles at an auction and retail shops which let space to principals and are responsible for selling their principal's goods;

20 b. liquidators at the beginning of a winding up may not have all the relevant documents or co-operation from directors to make an assessment of the taxation position of the taxpayer company in any given year: notwithstanding the statutory provisions. Moreover, it is commonly the case that external administrators (liquidators and receivers) assume control of companies where inadequate documentation has been maintained to identify the financial position of the company.

48. But even if the agents identified in s 254 are on average more likely to be better informed as to the financial position of their principal than the agents under s
30 255, that merely improves the prospect of a more reliable estimate, in those instances, of the tax which might become due. The circumstance that it will not always be the case illustrates why the approach taken (on this issue) in *Bluebottle* is also apposite to section 254.

49. *The Timing of engagement*:[6] Section 255(1)(a) imposes an obligation on the agent to pay 'the tax due and payable by the non-resident' when required by the Commissioner. This is said to be a ground of distinction with s 254(1)(a), because the latter operates immediately whereas the former operates only

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6 This is the third point raised in the appellant's outline at [49].

upon notice. This is of course a difference between the two sections. But it is not a material one.

a. Both sections select the criteria of their operation or reach by s 254(1)(a) and s 255 (1)(a).

b. But then each section imposes or confers an obligation and permission to retain money plus a personal liability which is (exhaustively) defined by reference to that obligation to retain money.

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c. It is the scope of these provisions which is directly in issue in this appeal.

d. In respect of these retention obligations, Parliament has chosen virtually identical language in both sections to define the permission, obligation and liability of the agents. Given that the two sections operate upon different events, that is no basis for concluding that, in describing the retention obligations and liabilities, Parliament intended them to have some different operation.

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e. And despite s 255(1)(a) referring to the agent being obliged to pay, when required, '*the tax due and payable by the non-resident*' the retention obligation is cast in terms of retaining the sum sufficient to pay the tax '*which is or will become due by the non-resident*'. The retention obligation is expressed in the same terms as that retention obligation in s 254(1)(d)(e) notwithstanding the different criteria for the obligations imposed in the earlier sub-paragraphs of the respective sections.

50. *Answerable as taxpayer.*[7] The respondents' submissions about the operation of section 254(1)(a) are set out above. However, the appellant relies on the

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circumstance that s 254(1)(a) makes the agent answerable as taxpayer while s 255(1) does not.

a. But again this difference is relevant to the selection of the circumstances in which the sections operate and does not bear upon the meaning to be afforded to the virtually identical language employed to define the retention obligation.

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7 This is the fourth point raised in the appellant's outline at [50].

b. The operation of s 254(1)(a) in making the agent answerable as taxpayer is itself subject to the limitation in ss(1)(d) and (e). The liability of the recipient of the demand for payment under s 255(1)(a) to pay the tax is subject to the limitation in ss 255 (1)(b) and (c).

Absurdity Issue

51. If s 254 operates in the way contended for by the appellant, then it will apply to any form of income, profit or gain (not simply a one off sale of real estate as in the instant case).

52. A receiver of a partnership operating a convenience store (or perhaps a company which owns and conducts a department store business) will possibly derive income, or make a profit with each sale. On the appellant's construction, the receiver will have to constantly and continually calculate the likely tax and make adjustments as each transaction is entered into. That is an absurd and impracticable situation. It is especially so where the receiver (or the company) was in any event complying with BAS (and indeed all other) obligations found elsewhere in the tax legislation.

53. An agent acting for a principal over a course of a financial year (such as a livestock agent or share dealer) may also possibly cause its principal to make profits with each sale (or some of them). Similarly, the agent will also have to constantly seek to calculate the likely tax and make the adjustments referred to above.

Bluebottle

54. The leading authority is *Bluebottle.* It was concerned with s 255, but as submitted above, the retention obligation in that section is materially the same as the retention obligation in s 254.

55. Section 254(1)(d) requires an agent to retain '*....so much as is sufficient to pay tax which is or will become due in respect of the income, profit and gains*'. Section 255(1)(b) requires a person having control over a non-resident's money to retain '*so much as is sufficient to pay the tax which is or will become due by the non-resident...*'. The key expressions '*so much as is sufficient*' and '*pay the tax which is or will become due*' are identical.

56. Section 254(1)(e) provides that the agent '*...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...*'. Section 255(1)(c) provides that a person in control of a non-resident's money '*...is made personally liable for the tax payable by him on behalf of the non-resident to the extent of any amount that he has retained, or should have retained, under paragraph (b); but he shall not be otherwise personally liable for the tax...*'. Again the language employed (and the limitation of personal liability which is thus provided for) is materially identical.

57. In *Bluebottle* the commissioner contended that the expression '*tax which is or will become due*' referred to '*both of the time of assessment and of a time prior to assessment*'. This was submitted on the basis that '*it was sufficient that there should be "an inchoate liability for tax" and that "the tax would become due, whether considered temporally or as a matter of probability*". This court rejected that submission (at [77]); and in substance the same submission is advanced in this appeal.

58. In explaining its reasons for rejecting the commissioner's submission, this court stated:

> *"[78] When s 255(1)(b) refers to "the tax which is or will become due by the non-resident" it must be read as referring to an ascertained sum. If the paragraph is not read in that way, the obligation to retain money which is imposed on the controller is an obligation of undefined content. It is undefined because all that may be retained (the controller "is hereby authorised ... to retain") "out of any money which comes to him on behalf of the non-resident" is sufficient to pay the tax which is or will become due. And it is that amount (and only that amount) which the controller is obliged to retain.*
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> *[79] Until the tax payable by the non-resident has been assessed it is not possible to say more than that there may be tax due by the non-resident. It is not possible to say that tax is due or that tax will become due. The prediction that tax may be due (and any prediction of its likely amount) may be able to be made with more or less certainty by a person who is armed with a deal of information, but there is no reason to suppose that the controller of a non-resident's money would ordinarily, let alone invariably, have that information and be in a*

position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives...".

59. This discussion is concerned with the provisions which define the retention obligation and not the criteria upon which the section is otherwise premised to operate. It is a discussion and reasoning which applies equally to the retention obligations in s 254. It leads to the conclusion that when Parliament selected the expression '*tax which is or will become due*' it intended to refer to a certain amount determined by assessment.

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60. It can of course be accepted (as the appellant submits at paragraph [54] of the appellant's submissions) that it is an error to treat decisions on the construction of a phrase in one section as controlling the construction of the same or a similar phrase in a different section. However, it is to invert the caution urged by that approach to require that the retention obligations which appear in the same statute (and indeed in adjoining provisions) and expressed in materially identical language are to be given a different meanings. If the object of statutory interpretation is to search for Parliament's objectively assumed intention[8], that points against the case urged by the appellant[9].

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61. Further, the evident purpose of both sections is the same: namely to permit and require the retention of monies received by persons other than the primary taxpayer, but on their behalf, for the purpose of securing payment of any tax owed by that primary taxpayer. The respondents' construction would give a harmonious approach to two sections with the same evident purpose.

The History of the Provisions

62. The appellant in its outline seeks to draw on the history of the provisions in
30 support of the construction for which it contends.[10] The five features to which the appellant then refers have already been sufficiently addressed in the discussion above. In the present case a proper consideration of the effect of the section should begin (and the respondents submit end) with the actual words used[11]. This court rightly recognised in *Bluebottle*[12] that matters of

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8 See, for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384.

9 *Registrar of Titles (W.A.) v Franzon* (1975) 132 CLR 611 at 618: "*It is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise*".

10 See appellant's outline commencing at [38].

11 *Certain Lloyds Underwriters v Cross & ors* (2012) 248 CLR 378 at 388-390.

legislative history provided little assistance in relation to the operation of s 255 and the same is true of s 254.

63. However, the judicial discussion of the earlier provisions affords no support for the appellant's contention that the retention obligation is enlivened prior to an assessment. Dealing with the cases to which the appellant refers in the section of the outline dealing with the history of s 254-

a. *Webb -v- Syme*[13]*:* This case is concerned with a wholly different issue and the remarks (concerning s 254) throw little light on the issue presently before this court.

b. *Deputy Commissioner of Taxation –v- Brown*[14]: In this case assessments had issued. The reasons of Dixon CJ state (in a passage not completely extracted in the appellant's outline) that a variety of sections (including s 254) *"are interpreted as imposing a liability upon the executors only quoad assets and as meaning by assessment to impose a debt owing by the estate"* (underlining added). It is this to which reference is made in *FCT –v- Prestige* (explicitly referring to the effect of the assessment to impose the debt on the estate).[15]

c. *Commissioner of Taxation –v- Resource Capital Fund IV*[16]: In this case an assessment had issued (reasons [14]). This case was concerned with s 255 and decided after this court's judgment in *Bluebottle*. The issue now under consideration in this appeal as to the operation of s 254 did not arise (and was not discussed).

d. *Bruton Holdings Pty Ltd (In Liq) –v- Commissioner of Taxation*[17]*:* In this case also an assessment had issued and the decision itself is concerned with the attachment provision of the *Taxation Administration Act* 1953.

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12 At [91].

13 (1910) 10 CLR 482, referred to in the appellant's outline at [30], [42] and [65] and in footnotes 16, 20, 25 and 27.

14 (1958) 100 CLR 32 at 42, referred to in the appellant's outline at [41].

15 (1994) 181 CLR 1 at 11, referred to in the appellant's outline at footnote 17.

16 (2013) 215 FCR 1, referred to in the appellant's outline at footnote 19.

17 (2009) 239 CLR 346, referred to in the appellant's outline at footnote 21.

Part VII:

64. The respondents' argument on their notice of contention (which seeks to support the reasons of the trial judge and Davies JA) is set out in Part VI above.

Part VIII:

65. The respondents estimate that they will take 1.5 hours for the presentation of their oral argument in chief.

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Dated 19 June 2015

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Shane Doyle Q.C.
Chambers

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Michael Trim