



## HIGH COURT OF AUSTRALIA

8 August 2018

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v  
MARTIN ANDREW THOMAS; THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA v MARTIN ANDREW PTY LTD;  
THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v  
THOMAS NOMINEES PTY LTD; THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA v MARTIN ANDREW THOMAS  
[2018] HCA 31

Today the High Court unanimously allowed two appeals (one in part) and dismissed two appeals from the Full Court of the Federal Court of Australia. The High Court held that the Full Court erred in concluding that "directions" given by the Supreme Court of Queensland pursuant to s 96 of the *Trusts Act 1973 (Q)* determined conclusively, against the Federal Commissioner of Taxation, the application of Div 207 in Pt 3-6 of the *Income Tax Assessment Act 1997 (Cth)* to certain franked distributions.

Division 207 sets out the effects, for tax, of beneficiaries of a trust having received income which includes franked distributions. In certain income years, the trustee of a trust ("the Trustee") received franked distributions within the meaning of Div 207. The Trustee passed resolutions that sought to distribute franking credits between beneficiaries *separately from*, and in *different proportions to*, the income comprising the franked distributions. The resolutions were intended to maximise refundable tax offsets and "stream" the income between beneficiaries to attract the most favourable marginal tax rates. In the appeals, the assumption that franking credits could be so distributed was referred to as the "Bifurcation Assumption".

The income tax returns for the Trustee and beneficiaries were prepared and lodged on the basis that the Bifurcation Assumption was legally effective under Div 207. Those returns produced deemed assessments. After the Commissioner gave notice of an audit, the Trustee applied for and obtained from the Supreme Court of Queensland "directions" that the resolutions gave effect to the Bifurcation Assumption, which was correct in law. The Commissioner completed his audit and issued Notices of Amended Assessment.

Two beneficiaries filed appeals, pursuant to Pt IVC of the *Taxation Administration Act 1953 (Cth)*, contending that *Executor Trustee and Agency Co of South Australia Ltd v Deputy Federal Commissioner of Taxes (SA)* (1939) 62 CLR 545; [1939] HCA 35 required that the "directions" conclusively determined the rights between the parties, even if the result was wrong in law. The primary judge dismissed the appeals, holding that the Bifurcation Assumption was flawed in law, and *Executor Trustee* did not require the Commissioner to give effect to the "directions". On appeal, the Full Court held, applying *Executor Trustee*, that the "directions" determined conclusively against the Commissioner the application of Div 207 to the franked distributions.

By grant of special leave, the Commissioner appealed to the High Court. Before the High Court, the Trustee and two beneficiaries accepted that the Bifurcation Assumption was legally ineffective under Div 207. The High Court held that the "directions" did not determine, against the Commissioner, the application of Div 207.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*