

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

NO B 60 OF 2017

THE COMMISSIONER OF TAXATION  
OF THE COMMONWEALTH OF  
AUSTRALIA

Appellant

MARTIN ANDREW THOMAS

Respondent

APPELLANT'S SUBMISSIONS



---

Filed on behalf of the Appellant: The Commissioner of  
Taxation of the Commonwealth of Australia  
Prepared by: Daniel Ryan  
AGS lawyer within the meaning of s 551 of the Judiciary Act  
1903  
The Australian Government Solicitor  
Level 11  
145 Ann St  
Brisbane QLD 4000  
DX 119 Brisbane

Contact: Daniel Ryan  
File ref: 17003278  
Telephone: 07 3360 5720  
Facsimile: 07 3360 5799  
E-mail: [daniel.ryan@ags.gov.au](mailto:daniel.ryan@ags.gov.au)

## Part I: Certification

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

## Part II: Issues arising

2. The ultimate issue arising in all four appeals is whether the Full Court erred in finding that it was bound by the decision of this Court in *Executor Trustee And Agency Company of South Australia Ltd v The Deputy Federal Commissioner of Taxes (South Australia)* (1939) 62 CLR 545 (*Executor Trustee*) to conclude that paragraph 1(b)(iii) of declarations made by the Queensland Supreme Court in *Thomas Nominees Pty Ltd v Thomas* (2010) 80 ATR 828 (the **Declaration**) determined conclusively as against the Commissioner the existence of the alleged rights referred to in the Declaration, including in respect of the assessment process under Part IVC of the *Taxation Administration Act 1953* (Cth) (the **TAA**).<sup>1</sup>
3. Subsidiary issues which arise include:
  - (a) how Div 207 of the *Income Tax Assessment Act 1997* (Cth) (the **1997 Act**),<sup>2</sup> operates in respect of attempts by a trustee to distribute franking credits differentially between beneficiaries;
  - (b) those sought to be raised by the Respondents by Notice of Cross Appeal and Notices of Contention, including to the extent to which those matters should be remitted.

---

<sup>1</sup> See (1) *Martin Andrew Thomas v Commissioner of Taxation* (QUD 72/2016), in which Mr Thomas appealed from the orders of Greenwood J in respect to his liability for primary tax for the 2006 to 2009 tax years. The Commissioner cross-appealed in respect of Mr Thomas' net income in 2006, 2007 and 2008 (now, B60/2016) (**Thomas Primary Tax**); (2) (which is the corollary of (1) in respect of 2008), *Martin Andrew Pty Ltd v Commissioner of Taxation* (QUD 78/2016), in which MAPL appealed from the orders of Greenwood J in respect of the 2008 tax year. The Commissioner cross-appealed in respect of net income in 2008 (now, B61/2017) (**MAPL Primary Tax**); (3) *Commissioner of Taxation v Thomas Nominees Pty Ltd* (QUD 79/2016), in which the Commissioner appealed in respect of Greenwood J's construction of s101 of the 1936 Act, or his application of it contrary to evidence in respect of Mr Thomas' entitlement to a share of the income of the trust estate in 2009. Thomas Nominees filed a Notice of Contention in support of the trial judge's conclusions (now B62/2017) (**2009 Year**); (4) *Commissioner of Taxation v Martin Andrew Thomas* (QUD 80/2016), in which the Commissioner appealed against Greenwood J's determination that Mr Thomas was not liable to an administrative penalty in respect of each of the income years 2006 to 2009 (now B63/2017) (**Thomas Penalty**).

<sup>2</sup> Including in respect of tax liabilities pursuant to the *Income Tax Assessment Act 1936* (Cth).

### **Part III: Certification regarding s 78B Judiciary Act 1903**

4. On 17 November 2017, s 78B notices were issued by the Respondents in B60 of 2017 and B61 of 2017.
5. The Appellant has considered whether notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and determined that no notice is required. For the avoidance of doubt, the Appellant is not pursuing any Chapter III argument.

### **Part IV: Reports and authorized reports citations**

6. *Thomas v The Commissioner of Taxation* [2015] FCA 968 (**FCA**).
7. *Thomas v The Commissioner of Taxation* [2017] FCAFC 57 (**FCAFC**).
- 10 8. In the particular circumstances, *Thomas Nominees Pty Ltd v Thomas* (2010) [2010] QSC 417; 80 ATR 828 (**QSC**).

### **Part V: Narrative of relevant facts found or admitted**

9. At all relevant times, Mr Martin Thomas was the sole shareholder and director of (or in any event controlled) Thomas Nominees Pty Ltd (**Thomas Nominees**), and Martin Andrew Pty Ltd (**MAPL**).<sup>3</sup>
10. Thomas Nominees (the **Trustee**) was the trustee of the Thomas Investment Trust (the **Trust**), which was established by trust deed dated 1 February 1979 (the **Trust Deed**).<sup>4</sup> Mr Thomas and MAPL were beneficiaries of the Trust (the **Beneficiaries**) in each of the income years ending 30 June 2006, 2007, 2008 and 2009 (the **Income Years**).<sup>5</sup>
- 20 11. In each of the relevant Income Years the Trustee received franked distributions within the meaning of Division 207 of Part 3-6 of the 1997 Act (**Div 207**).<sup>6</sup>
12. In each of the Income Years, the Trustee passed two resolutions, relevantly in identical terms (the **Net Income Resolutions** and the **Franking Credit Resolutions**, collectively, the **Resolutions**).<sup>7</sup>

---

<sup>3</sup> QSC at [16]; FCA at [11]; FCAFC at [8] per Pagone J; FCA, [12]; FCA [28].

<sup>4</sup> QSC, at [15]; FCA, at [9]; FCAFC, at [8].

<sup>5</sup> QSC, at [16]; FCA, at [10]; FCAFC, at [9].

<sup>6</sup> QSC, at [18]; FCA, at [29]; FCAFC, at [9].

<sup>7</sup> QSC, at [4], [26]; FCA, at [30]-[31]; FCAFC, at [18]. The text of the Resolutions is set out in FCAFC, at [19] per Pagone J. See also FCA, at [58] per Greenwood J. The resolutions made in the 2009 income year contained a variation in the wording from that contained in the Resolutions made in 2006-2008. That variation is otherwise immaterial on the Commissioner's appeal in respect of Thomas Primary Tax and MAPL Primary Tax.

13. The Net Income Resolutions and the Franking Credit Resolutions each purported to apply 'the net income of the trust fund' for the Income Years to the benefit of Mr Thomas and MAPL by credit to accounts maintained by the Trustee for them, but in different ways.<sup>8</sup>

#### The Bifurcation Assumption

14. The assumption underlying the Resolutions was that the taxation benefit given by a franking credit pursuant to Div 207 was a discrete category of income received into the trust estate separately from the franked distributions to which it related with the consequence that the franking credit was capable of being dealt with *separately* and *disproportionately* from the income comprising *franked distributions* in whatever manner the Trustee resolved, provided that the power in the Trust Deed was expressed broadly enough (the **Bifurcation Assumption**).<sup>9</sup>

#### Taxpayers' Returns

15. The income tax returns of the Trust in each of the Income Years were prepared on the basis that the Resolutions gave effect to the Bifurcation Assumption. They disclosed:<sup>10</sup>

	2006	2007	2008	2009
<b>Section 95 net income</b>	\$798,826	\$1,839,635	\$142,651	\$173,743
<b>Distributions to Martin Thomas:</b>				
Share of non PP income	\$21,600	\$4,615	\$50	\$16,600
Franking credits	\$2,416,217	\$4,765,353	\$1,030,839	\$1,050,925
TFN withheld	\$17,502	-	-	-
<b>Distributions to MAPL:</b>				
Share of non PP income	\$763,149	\$1,822,307	\$138,109	\$157,143
Attrib. foreign income	\$125	\$12,713	-	-
Other foreign income	\$13,952	\$1,821	\$4,492	-
Franking credits	\$228,900	\$548,488	\$42,780	\$46,900
Foreign tax credits	\$4,267	-	\$1,185	-

16. According to those returns, Mr Thomas was entitled to the bulk of the franking credits on the franked distributions received from the Trust in each of the Income Years. Conversely, MAPL was entitled to the bulk of the net income, which was derived in the main from those franked distributions, in each of the Income Years (the **Bifurcated Returns**). The Bifurcated Returns produced deemed assessments (**Deemed Assessments**) pursuant to s166A of the *Income Tax Assessment Act 1936* (Cth) (the **1936 Act**), as explained further below at [56].

<sup>8</sup> FCA, at [32]; FCAFC, at [19].

<sup>9</sup> The Bifurcation Assumption was exposed in the reasons in *Thomas Nominees Pty Ltd v Thomas* (2010) 80 ATR 828 per Applegarth J (QSC), at [4], [5], [34], [35] and [49] – [52]. Both judgments in the Federal Court correctly identified that this was the assumption underlying the Resolutions. See FCA at [490]; FCAFC at [21].

<sup>10</sup> FCA, at [39]; FCAFC, at [19].

### Notice of Audit and State Court Proceedings

17. Subsequently, the Commissioner gave notice of an audit;<sup>11</sup> and expressed concern over the correctness of the Bifurcation Assumption and the consequential effect of the Resolutions.<sup>12</sup>
18. Before the Commissioner could complete any audit or issue any amended assessments, the Trustee sought orders from the Queensland Supreme Court (*a*) pursuant to s 96 of the *Trusts Act 1973* (Qld) for judicial advice;<sup>13</sup> and (*b*) in the alternative, equitable rectification of the Resolutions (the **State Court Proceedings**).<sup>14</sup>
- 10 19. Mr Thomas and MAPL, as the relevant Beneficiaries, were joined as respondents to the application, but played no active part in it. All other potential beneficiaries apparently supported it.<sup>15</sup>
20. The Commissioner was given notice of the application. He indicated that he was neither a necessary nor appropriate party in circumstances where the State Court Proceedings did no more than seek judicial advice to interpret, or otherwise to rectify, the Resolutions.<sup>16</sup>
21. The argument put to Applegarth J focussed heavily on s 207-35 of the 1997 Act, and the example given in it.<sup>17</sup>
- 20 22. Applegarth J, in reasons published 12 November 2010, held that the Bifurcation Assumption was correct in law; that the Trustee subjectively intended to make a bifurcated distribution of franking credits between Beneficiaries; and that the Resolutions gave effect to such intention. He also indicated that, had he reached the conclusion that the Trustee did not document the Resolutions so as to give effect to its intention of bifurcation, then he would have ordered the Resolutions be rectified to reflect the Trustee's intention. He did not identify the terms of any such rectified resolution or

---

<sup>11</sup> QSC at [23].

<sup>12</sup> QSC at [6], [48].

<sup>13</sup> See s 96 *Trusts Act 1973* (Qld), (Right of trustee to apply to court for directions); See also s 97 (Protection of Trustee while acting under Direction of Court). On 'judicial advice', See *Macedonian Orthodox Community Church of St Petka Incorporated v His Eminence Petar the Diocesan Bishop* [2008] HCA 42; (2008) 237 CLR 66, 89-95, [54]-[69] per Gummow A-CJ, Kirby, Hayne and Heydon JJ.

<sup>14</sup> See QSC at [9].

<sup>15</sup> QSC at [10].

<sup>16</sup> Exhibit JL-5 to the affidavit of Jane Lye sworn 10 May 2017.

<sup>17</sup> The Commissioner's position was reflected in nothing more than a tendered letter, which did not represent full argument: See QSC at [48].

resolutions.<sup>18</sup> Senior Counsel for the Trustee then prepared and filed minutes of orders which Applegarth J then made. There is no evidence (and it was not the case that) Commissioner was given notice of the form of the proposed orders, or that they would extend to include declarations of right, as opposed to merely directions that the Trustee would be justified in acting on the judicial advice.

#### Amended Assessment

- 10 23. Following completion of the audit in 2011, Notices of Amended Assessment were issued to each of the Respondents and each Respondent lodged objections. In May 2012, the Commissioner issued further Notices of Amended Assessment to the Beneficiaries for primary tax liabilities in each of the income years (**Amended Assessments**).<sup>19</sup> Following a review of the Respondents' Part IVC Appeal Statement, in November 2012 the Commissioner informed Thomas Nominees that he accepted one of the grounds relied on in each of the relevant objections to the effect that all premiums paid by Thomas Nominees as part of its options trading business should be deductible under s 8-1 of the 1997 Act, which came to be known as the "options concession".
24. The Respondents challenged the Commissioner's Amended Assessment objection decisions concerning the primary tax assessments for the 2006 to 2008 income years, and concerning penalty tax assessments, by filing appeals pursuant to s 14ZZ of the TAA in the Federal Court on 8 June 2012 and 15 June 2012.<sup>20</sup>
- 20 25. As the net income of the Trust for the purpose of s 95 for the 2009 tax year was \$173,743 but the trust was in loss, the Commissioner issued Thomas Nominees with a trustee notice of assessment for the 2009 tax year under s 99A in respect of the entire s 95 net income of the Trust on the basis that no beneficiary was presently entitled to a share of the Trust's income in that year.<sup>21</sup> On 28 February 2013, Thomas Nominees lodged a taxation objection against that assessment. The Commissioner disallowed that objection on 16 April 2013. Thomas Nominees challenged the objection decision by filing an application in the Federal Court in June 2013.<sup>22</sup>

---

<sup>18</sup> QSC, [52].

<sup>19</sup> See the Appellant's chronology from 9 to 24 May 2012.

<sup>20</sup> See the Appellant's chronology at 8 and 15 June 2012.

<sup>21</sup> See the Appellant's chronology at 25 January 2013.

<sup>22</sup> See the Appellant's chronology at 17 June 2013.

### Appeal to the Federal Court

26. The essential issue raised by the Amended Assessments was the correctness of the Bifurcation Assumption, and consequent upon that, how Div 207 operated upon the Resolutions to allocate between the Beneficiaries the tax offsets for franking credits.<sup>23</sup>
27. The Trustee and Beneficiaries contended that *Executor Trustee* required that the orders of Applegarth J conclusively determined the rights of the Beneficiaries against the Trustee, such that the Commissioner and the Federal Court were bound by them, even if that was wrong in law.<sup>24</sup>
- 10 28. Greenwood J accepted the Commissioner's argument that *Executor Trustee* had no such application.<sup>25</sup> He found the Bifurcation Assumption was flawed in law,<sup>26</sup> and held that the Amended Assessments should stand,<sup>27</sup> as the taxpayers had failed to discharge the onus.<sup>28</sup>

### Appeal to the Full Federal Court

29. In the Full Court, Pagone J treated the four proceedings as turning on one key issue. In that regard, his Honour:
- (a) explained his view of the operation of Div 207 in relation to franking credits in a way which rejected the Bifurcation Assumption: FCAFC, [10]-[16];
- (b) reached a provisional conclusion that Div 207 operated upon the Net Income Resolutions to allocate the franking credits between the Beneficiaries in proportion to the share of the net income recorded in those Resolutions: FCAFC, [19]-[22];
- 20 (c) however, when he turned to consider whether the operation of Div 207 was affected by the orders of Applegarth J, he held that *Executor Trustee* required that although the Commissioner *was not bound* (or in an alternative formulation, *may not be bound*) by that Court's construction of Div 207 as embodied in declaration 1(a), he (and the Court) *were bound* by declaration 1(b)(iii): FCAFC, [23]-[27] and, accordingly, the appeals must be allowed for the 2006-2008 Income Years;

---

<sup>23</sup> FCA, at [5].

<sup>24</sup> FCA, at [387].

<sup>25</sup> FCA, at [444]-[445].

<sup>26</sup> FCA, at [519].

<sup>27</sup> FCA, at [520].

<sup>28</sup> FCA at [521].

- (d) then reached a similar result for the 2009 Year proceedings: FCAFC [28]-[29];
  - (e) concluded that, because of his findings on the Declaration and *Executor Trustee*, it was unnecessary to consider any other questions in the appeals: FCAFC, [27], [30].
30. Dowsett J agreed at [1]. Perram J also agreed at [2] and further relied on the proposition that under the *Cameron v Cole* principle,<sup>29</sup> the orders of the Supreme Court were valid and binding until set aside.<sup>30</sup>

## Part VI: Argument

### 1. Summary

31. In summary, the Appellant contends:

- 10
- (a) Div 207 of the 1997 Act draws a critical distinction between *franked distributions*, and the *franking credits* attaching to them. It does not treat franking credits as some separate species of income capable of being dealt with, and distributed separately from, the franked distribution to which they are attached. Instead, the Act effects a statutory allocation of the *franking credits* and the tax offsets arising from them in the same proportions as the beneficiaries share in franked distributions, in turn depending on how the beneficiaries share in the s 95 net income;
  - (b) the result is that Div 207 does not permit the Bifurcated Returns (set out at [15] above). Applegarth J was wrong to hold it did. Conversely, Greenwood J was correct (at FCA, [519]), and Pagone J was correct in his analysis of the operation of Div 207 as described at FCAFC [10]-[16];
  - (c) Pagone J's provisional conclusions at FCAFC [19]-[22], in applying Div 207 to the Resolutions, were also correct;
  - (d) however, Pagone J erred at FCAFC [23]-[27] in holding that this Court's decision in *Executor Trustee* required that the operation of Div 207 was to be determined by (one sub-paragraph of) the Declaration;
  - (e) his Honour also erred at FCAFC [28] and [29] in respect of his approach to determining the taxable income of and tax payable by Thomas Nominees for the
- 20

---

<sup>29</sup> *Cameron v Cole* [1944] HCA 5; (1944) 68 CLR 571, at 585, 590, 598 and 605; *State of New South Wales v Kable* [2013] HCA 26; (2013) 252 CLR 118 at 133 [32].

<sup>30</sup> FCAFC, at [2]-[6].



2009 income year (B62/2017).

32. Upon that summary, these submissions are further divided to address: (2) The taxation scheme; (3) The correct tax position on the facts; (4) The assessment, objection and appeal process (**Part IVC**); (5) *Executor Trustee*; (6) Pagone J's approach to the 2009 Year (affecting Thomas Nominees Pty Ltd); (7) Perram J's additional observations; (8) The resolution of the appeals.

## **2. The taxation scheme**

33. Div 207 creates a basic distinction between *franked dividends* on the one hand, and *franking credits* available on such a distribution, on the other.

### 10 The Div 207 Scheme

34. In the simple case where a company makes \$100 in profit, paying \$30 in tax on that, and distributing the whole of the profit to its only member, the member would receive a *franked distribution* of \$70 which it would ordinarily include in its assessable income. Div 207 requires that the member also include in its assessable income a *franking credit* of \$30, for which the member would receive a matching tax offset: see ss 207-5 to 207-20.

35. Sections 207-25 to 207-57 seek to adapt that general principle to the case where franked distributions are made to a partnership or trustee of a trust, by recognising that the benefit of the distributions flow indirectly to one or more of the partners or beneficiaries. The  
20 broad purpose of the sections is to ascertain how much of the franking credits associated with a franked distribution to a partnership or trustee of a trust will form part of the assessable income of each partner or beneficiary and who gets the benefit of the associated tax offset and who gets the benefit of the associated tax offset.

36. Sections 207-35 and 207-45 state the general rule and mechanism, which is elaborated upon in the further sections 207-50 to 207-57.

37. When the provisions, namely, s 207-5 (Overview); s 207-20 (General Rule – gross up and tax offset); s 207-35 (Distribution made to or flows indirectly through a partnership or trustee); s 207-45 (Tax offset – distribution flows indirectly to an entity); s 207-50 (Key concepts); s 207-55 (Share of a franked distribution), and s 207-57 (Share of the  
30 franking credit on a franked distribution) are looked at together, there is a staged process to be applied. That is, focussing solely on trusts:

- (a) first, under s 207-35, where a *franked dividend* is received by a trustee, the

assessable income of the *trust* includes the amount of *franking credits* on the distribution (in addition to any other amount included in that assessable income): s 207-35(1)(a); s 207-35(2);

(b) secondly, it is necessary to identify whether any *franked distribution* has flowed indirectly to a beneficiary of a trust: s 207-35(3)(c); s 207-50;

(c) thirdly, if so, it is necessary to identify if the beneficiary has assessable income attributable to a *franked distribution*: s 207-35(3)(d);

(d) fourthly, the beneficiary's assessable income then includes any *franking credit* amount as is equal to its share of the franking credit on the distribution: See ss 207-35(3) (final *bis*); 207-45; 207-57.

10

#### The Bifurcation Assumption is flawed

38. What is critical from the stepped approach, in particular the fourth and final stage, is a statutory notional allocation of *franking credits* to beneficiaries following the proportions which have been established with respect to their notional sharing in *franked distributions* at the earlier stages.

39. The Act does not constitute franking credits as a separate species of income that can be dealt with by a trustee as such, let alone dealt with in different proportions to the sharing of the franked distributions to which the Act attached them.

40. A decision of a trustee how to distribute income comprising franked distributions may have an ultimate impact on how *franking credits* are shared; but only to the extent that any such decision is effected by that sharing of the franked distributions.

20

41. Once the s 97(1)(a) shares are established, that decision will determine each beneficiary's share of the franked distributions under s 207-55, and consequently determine each beneficiary's share of franking credits under s 207-57.

42. Based on these conclusions, certain other matters follow:

(a) the example in s 207-35 illustrates that the 1997 Act contemplates that a trust deed may enable franked distributions to be shared between beneficiaries in different proportions to other species of income;

(b) however, Applegarth J has over-read the stated example. It does *not* illustrate the Bifurcation Assumption or support the Bifurcated Returns. Specifically, it is *not* an example of franked distributions (which formed part of the s 95 net income)

30

being allocated to beneficiaries in one proportion and the franking credits being allocated between them in differing proportions.

### **3. The correct tax position on the facts**

43. In this case, the critical step in the analysis arises at the third stage under s 205-55(2), and s 207-55(3), together with column 3. The task is to work out the amount notionally allocated to each of the beneficiaries as *their share of the franked distributions*<sup>31</sup> by reference, having regard to the facts of this case, to so much of the amount of the franked distributions as was *taken into account in working out* each of the Beneficiaries' share of the trust's net income under s 97(1)(a) of the 1936 Act.
- 10 44. The correct way in which this is done is as Pagone J described at FCAFC [19]-[22].
45. In each Income Year, the primary source of the Trust's income was the franked distributions. There were some other smaller sources of income. The Net Income Resolutions, in their terms, treat all species of income on the same footing. All income is brought together as one pool. There is no attempt, contrary to the example in section 207-35, to allocate the franked distributions to one beneficiary and the rest of the income to another.
46. Equally, all expenses are treated on the same footing in the Net Income Resolutions. There is no attempt to allocate differentially some expenses to some species of income and not to others.
- 20 47. The result is that the Net Income Resolutions have allocated between the beneficiaries the whole of the net income of the Trust for the purposes of s 97(1)(a) in the proportions consistent with the amounts stated in such resolutions. For the 2006 Income Year, for example, that proportion is the first \$21,600 of the net income to Mr Thomas and the balance to MAPL. The net income for the Trust for that year is \$798,826. The proportions are thus approximately: 2.7% for Mr Thomas and 97.3% for MAPL.
48. Section 207-55(3), operating together with section 207-50(3)(b)(i), then notionally allocates the franked distributions between Mr Thomas and MAPL in those proportions (2.7: 97.3).
49. Section 207-57 then effects a statutory allocation of the franking credits between the

---

<sup>31</sup> For the purposes of determining the share amount referred to in s 207-50(3)(b)(i).

beneficiaries in those same proportions (2.7:97.3).

50. The result for the 2006 Income Year is the franking credits are allocated \$71,523.42 to Mr Thomas and \$1,073,243.14 to MAPL.
51. The Franking Credit Resolutions are then exposed as having no effect for the purposes of Div 207 for two reasons. First, they are based on the Bifurcation Assumption which is wrong on the proper construction of Div 207. Franking credits are not a separate species of income that Div 207 permits a trustee to allocate between beneficiaries in any proportions, let alone proportions that differ from the proportions in which the franked distributions, reflected in the s 97 net income, are allocated between them.
- 10 52. Secondly, as Pagone J suggested at FCAFC [21], once the Net Income Resolutions have done their work, all net income of the Trust has been allocated between the beneficiaries; there is simply no net income left over (relevantly net income comprising franked distributions) that is capable of being further dealt with under the Franking Credit Resolutions.

#### **4. The assessment, objection and appeal Process (“Part IVC”)**

##### The legislative context

53. **General administration.** The Commissioner is a statutory officer established by s 4 of the TAA and charged with the general administration of tax legislation, including pursuant to s 3A of the TAA; s 8 of the 1936 Act; and s 1-7 of the 1997 Act.
- 20 54. **Income Tax.** Section 6 of the 1936 Act defines “Tax” as meaning “income tax imposed as such by any Act, *as assessed* under this Act...”<sup>32</sup> Income tax the subject of an assessment is made due and payable.<sup>33</sup> Section 3-5 of the 1997 Act provides for the basic duty to pay income tax. That is, “Income tax is payable for each year by each individual and company, and by some other entities.” Section 3-10 also confirms that a taxpayer must lodge income tax returns as provided by the 1936 Act. Thus, s 161(1) of the 1936 Act provides that “Every person must, if required by the Commissioner by notice published in the Gazette, give to the Commissioner a return for a year of income within the period specified in the notice.”

---

<sup>32</sup> Excluding mining withholding tax and withholding tax.

<sup>33</sup> For financial years ended 30 June 2010 or earlier, this is provided for by former s 204 of the 1936 Act (as continued in force by item 56 of Part 3 of Schedule 1 to the *Tax Laws Amendment (Transfer of Provisions) Act 2010* (Cth)). For financial years ended 30 June 2011 and later, this is provided for in s 5-5(2) of the 1997 Act.

55. **Commissioner's duty of assessment.** In that regard, the Commissioner is vested with certain duties, including to make an assessment pursuant to s 166. Section 171 provides for what should happen if the Commissioner does not make an assessment on a return within a set period of time. "Assessment" means "the ascertainment of the amount of taxable income (or if there is no taxable income)", and "the tax payable on the taxable income (or that no tax is payable)."<sup>34</sup> See also s 169 of the 1936 Act.<sup>35</sup> In the ordinary course, and pursuant to s 174 of the 1936 Act, the Commissioner must then issue a Notice of Assessment as soon as is convenient after an assessment is made.
- 10 56. **Deemed Assessment.** As noted, s 166A of the 1936 provides for deemed assessments where a relevant entity (established under the former Part VI, Div 1B) furnishes a return in respect of income of a year. In those cases, the Commissioner is (a) taken to have made an assessment of the relevant taxable income or net income, and the tax payable (and other particulars) in effect as specified in the return; and (b) the return is deemed to be the notice of assessment.
57. **Amendments of assessments.** Section 170 of the 1936 Act makes provision permitting the Commissioner to issue amended assessments. That power is constrained by certain time limitations. Accordingly, every taxpayer must be taken to know that an assessment remains vulnerable to review.<sup>36</sup>
- 20 58. **Dissatisfaction and objection.** From that point, s 175A of the 1936 Act provides that a taxpayer *dissatisfied* with an assessment may object in the manner set out in Part IVC of the TAA. Section 14ZY of the TAA obliges the Commissioner to decide whether to allow (wholly or in part) or to disallow a taxpayer's objection to an assessment, determination, notice or decision previously made by the Commissioner. In that context, s 14ZZ of the TAA permits a person dissatisfied with the Commissioner's decision to

---

<sup>34</sup> Although the general statutory structure is that definitions in the 1936 Act are not picked up in the other legislation, the 1997 Act defines *assessment* in 995-1 (Dictionary) in two parts: the one being an "assessment of an assessable amount" (meaning "an *ascertainment* of the assessable amount"); and the other adopting the definition in s 6(1) of the 1936 Act. For its part, s3AA, Schedule 1 of the TAA applies the meaning given to expressions in Schedule 1 of the 1997 Act.

<sup>35</sup> Concerning Assessments on all persons liable to tax ("Where under this Act any person is liable to pay tax (including a nil liability), the Commissioner may make an assessment of the amount of such tax (or an assessment that no tax is payable).")

<sup>36</sup> A notice of assessment is conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the TAA challenging that assessment, that the amount and all the particulars of the assessment are correct. As was discussed by this Court in *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146: see, e.g., at 156 [23]. Prior to 1 July 2015, this is provided for by s 177 of the 1936 Act. After 1 July 2015, this is provided for by Item 2 of s 350-10(1) of Schedule 1 to the TAA.

pursue one of two avenues of redress:

(a) to seek review of the decision in the Administrative Appeals Tribunal: s14ZZ(1)(a)(i); or

(b) to appeal to the Federal Court: s14ZZ(1)(a)(ii) and (1)(b).<sup>37</sup>

59. Thus, Part IVC operates as a comprehensive regime for the resolution of disputes to which it applies, including in respect of any court-determined “taxable facts”.<sup>38</sup>

#### Part IVC as a code

10 60. There is an established line of authority informing the proper approach to be taken to, or to be adhered to, by Courts in respect of a legislative scheme which: (a) creates the rights and duties; (b) provides for the mechanisms for the determination of them; and (c) also provides for judicial review in the specific and general sense.<sup>39</sup> In *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 42, Dixon CJ observed:

20 *They would do so on the principle which is embodied in the third of the categories of Willes J. in *Wolverhampton New Waterworks Co. v. Hawkesford* [1859] EngR 510; (1859) 6 CB (NS) 336 (141 ER 486): “where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class” (1859) 6 CB (NS), at p 356 (141 ER, at p 495). That of course is a very general statement of principle and the particular application was remote from this case. It operates however over the whole field of statutory liabilities and it can hardly have a safer application than in a taxing measure. [Emphasis added]*

61. See also Williams J (at 42); *Dorney v Commissioner of Taxation* [1980] 1 NSWLR 404 per Hutley JA.<sup>40</sup>

62. Once there are deemed assessments based on the lodgment of income tax returns, the above statutory Code provides the sole mechanism by which those assessments could be

---

<sup>37</sup> Further, s44 of the *Administrative Appeals Tribunal Act 1975* (Cth) provides for an ‘appeal’ to the Federal Court, on a question of law, from a decision of the AAT.

<sup>38</sup> In the sense in which that term was used by Barwick CJ in *Bailey v Commissioner of Taxation* (1977) 136 CLR 214 at 217.

<sup>39</sup> The authorities include: (1) *Doe v Bridges* (1831) 1 B&AD 846 (109 ER 1001) per Lord Tenterborn CJ; (2) *Barraclough v Brown* (1897) AC 615 at 620.3 per Lord Herschell, at 622 per Lord Watson, and at 623 per Lord Davey; (3) *Pasmore v The Oswaldtwistle Urban District Council* (1898) AC 387 (HL) at 394 per Halsbury LC; (4) *Josephson v Walker* (1914) 18 CLR 691 per Griffith CJ at 695, 696 (adopting *Pasmore*).

<sup>40</sup> The whole of the reasons of Hutley JA. Glass JA agreed generally, but with his own reasons for the disposal of the matter. Mahoney JA dissented. *Dorney* was appealed to the High Court as one of the proceedings in *FJ Bloeman Pty Ltd v The Commissioner of Taxation* (1981) 147 CLR 360. No relevant doubt was cast upon this part of Hutley JA’s analysis.

finally determined or altered in law. Specifically, in this case:

- (a) if the Respondents were *dissatisfied* by the Deemed Assessments, they could activate the appeal process under Part IVC;
- (b) alternatively, if (as is more likely) the Respondents were *satisfied* with the Deemed Assessments but feared a possible future adverse action by the Commission to issue (higher) amended assessments, they were required to wait and see if the Commissioner would do so, and then commence a Part IVC process;
- (c) if no amended assessment issued within the relevant time period, the Deemed Assessment would be unalterable.

10 **5. Executor Trustee does not oust Part IVC**

63. Greenwood J was correct to reject the argument that *Executor Trustee* binds the Commissioner, or otherwise excluded the Federal Court from determining the appeal under Part IVC, on the correct construction of Div 207.<sup>41</sup> Conversely, the Full Court erred in treating *Executor Trustee* as binding the Commissioner, and otherwise ousting the authority of the Federal Court to decide the appeal under Part IVC, on the correct construction of Div 207.

The State Court Proceedings

64. In respect of the State Court Proceedings, and the Declaration obtained:

- (a) the Respondents (but not the Commissioner or Commonwealth) were parties to a proceeding which was, in terms, one for judicial advice and (subject to that advice), a suit for rectification;
- (b) there was no party contradicting the application; or the orders eventually sought;
- (c) mere notice of proceedings to the Commissioner could never be sufficient to place him in the position of a party.<sup>42</sup> Further, and in any event, the Commissioner was not given notice of the orders sought;
- (d) the Declaration formulated and put to Applegarth J by the Respondents went well beyond what was necessary or appropriate for judicial advice to a Trustee;

---

<sup>41</sup> FCA, at [443]-[446].

<sup>42</sup> *John Alexander's Clubs Pty Ltd v White City Tennis Club Limited* [2010] HCA 10; (2010) 241 CLR 1, at 48 [139]ff, per French CJ, Gummow, Hayne, Heydon and Kiefel JJ.

- (e) there is no evidence of any genuine controversy between any of the parties to the State Court Proceedings. The fair characterization of what happened is that the Trustee (being directed by at least one of the Beneficiaries) became concerned, when the Commissioner gave notice of an audit, to seek to preempt the ability of the Commissioner to interpret Div 207 and apply it to the Resolutions via amended assessments; and thus, to prevent the final determination of these questions under the process.

#### Declarations

- 10 65. There has been considerable development in the law of declarations: see e.g., *Foster v Jododex Pty Ltd* (1972) 127 CLR 421; *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564; and *Edwards v Santos Ltd* (2011) 242 CLR 421, at [37]-[39] per Heydon J.
- 20 66. However, *that* development does not determine *this* case. The short answer is that the Commissioner was not a party to the State Court Proceedings. The next answer (which is related) is that it has always been the case that common law proceedings only determine the issues raised by, and as between, parties. The larger answer is that a declaration of a State Court cannot pre-empt or determine an outcome where that outcome is vested in and to be arrived at pursuant to procedures laid out in a federal statute. Put another way, Part IVC of the TAA requires that *the question of liability for taxation* is to be determined by a particular process; and *vests the resolution of that process* in certain tribunals, namely the AAT or Federal Court.
- 30 67. The possibility for a State court finally determining the operation of a tax law in its application to a transaction subject to assessment by the Commissioner would equate to an impermissible grant of mandamus to compel an officer of the Commonwealth to perform duties imposed upon the officer by federal law;<sup>43</sup> alternatively it would make redundant the performance of the Commissioner's duty pursuant to s 14ZZ of the TAA.

#### Executor Trustee

- 30 68. The decision in *Executor Trustee* does not require that a Federal Court should disregard its statutory duty to determine issues under Part IVC in accordance with the correct construction of the taxing Statute, or require that some prior declaration must be taken as

---

<sup>43</sup> See *Ex parte Goldring* (1903) 3 SR (NSW) 260, per Stephen ACJ, Owen J and Walker J.



resolving tax law questions. That is for a number of reasons.

69. First, in *Executor Trustee*, the party seeking to resile from a previously declared interpretation of a will was the trustee who had been party to the same prior declaratory proceedings.<sup>44</sup>

70. Secondly, in this case, the State Court Proceedings were for judicial advice in respect of the proper administration of a trust.<sup>45</sup> That advice properly only concerned the immunisation of the Trustee in respect of *its* decisions, and in respect of *its* liability to beneficiaries: see, e.g., s 97 *Trusts Act 1973* (Qld). The Declaration should be understood as going no further than that legal context.

10 71. Thirdly, the usual orders in an advice application are in terms “That the trustee would be justified [doing X]...” The Declaration rises no higher than the judicial advice application: that is to say, it rises no higher than the protection of the Trustee in respect of its decisions and Resolutions.

72. Fourthly, as was made clear in *Executor Trustee*, there is no question of *res judicata* or of *issue estoppel*; nor can a separate declaration generate rights *in rem* against third parties.<sup>46</sup>

73. Fifthly, is what was actually decided in the case. The whole of the reasons of each of the justices require proper consideration. However, even as Latham CJ expressed the matter at its highest (at 562), it was qualified:

20                   ... *But when, in duly constituted proceedings before a competent court, the rights of cestui qui trust against a trustee and the corresponding duty of the trustee towards the cestui que trust have been defined, there is no means whereby those rights can be otherwise defined, because each party is conclusively bound by the order of the court. If the right in question is a right of the cestui que trust to receive money, such as income, from the trustee, the order necessarily and in the nature of the case finally determines, so far as it goes, the nature and extent of the right of the cestui que trust. When the revenue authorities come to impose a tax in relation to such rights, they must, in my opinion, take them as they in fact actually exist between the parties.* [Emphasis added]

30 74. Latham CJ was concerned with who, amongst potentiates, should be treated as the owner or beneficiary of certain property. That was a question of the proper construction of the

---

<sup>44</sup> (1939) 62 CLR 545, at 561.

<sup>45</sup> QSC at [1].

<sup>46</sup> Latham CJ at 562; Dixon J at 570.

dealings *between those parties*. It *does not follow* that those private dealings can pre-determine the application of tax legislation. Were that the case, it would be open to any taxpayer to make arrangements with any third party so as to privately (or privatively) specify and determine the tax result of their dealings, and oust the duties of the Commissioner.

- 10 75. Put another way, parties may contract to deal with any given species of property in any number of ways. They may contract in a manner which is consistent with the law, or which misunderstands it. It does not follow that, because they have assumed or agreed that property be dealt with in a certain way, therefore the property can be dealt with that way, irrespective of common or statute law.
76. Thus, a trustee and a beneficiary may agree between them that copyright in certain writing vests in the beneficiary. That does not mean that that the actual author of the writing loses his, her or its rights to the work.
77. In any case, sixthly, the reasons of Dixon J (with whom Evatt J agreed) were in this respect more cautiously expressed. As Dixon J considered it (at 570), declarations construing private “operative instruments” operate in law “...only as declarations determining, *as between trustee and beneficiary*, the interests otherwise existing, that is, *arising under the will*.”
- 20 78. Seventhly, there is an additional problem with Pagone J’s reliance on *Executor Trustee*. He has treated only one part of the Declaration, para 1(b)(iii), as binding on him. He has treated as not binding, or possibly not binding on him, the critical construction of Div 207 in paragraph 1(a) on which all of the following parts of the Declaration hang.
79. This is not simply a case of impermissible choosing of which parts of a composite and integrated set of declarations will be treated as creating taxable facts and which parts will be ignored, which would be reason enough not to apply *Executor Trustee*. The additional problem is that the construction which Pagone J has placed on Declaration 1(b)(iii), divorced from the paragraphs of the Declaration that come before and after it, has in fact *altered* the meaning of that Declaration from that which it had in the light of Reasons of Applegarth J and the surrounding paragraphs of the Declarations.
- 30 80. Consistent with his Reasons adopting the correctness of the Bifurcation Assumption, Applegarth J’s Declarations as a whole, including Declaration 1(b)(iii), told the Trustee that the Resolutions legally achieved a purpose available under Div 207, which was to

put the lion's share of the net income (including franked distributions) in the hands of MAPL but the lion's share of the franking credits in the hands of Mr Thomas. See again the Bifurcated Returns at [15] above.

81. Pagone J has correctly held Div 207 does not permit the outcome reflected in the Bifurcated Returns. He seems to have reinterpreted Declaration 1(b)(iii) as meaning that the net income of the trust estate, including the franked distributions comprised in it, has been shared between the beneficiaries in some unstated proportions such that, when those same proportions flow through under Div 207 to the franking credits, the franking credits are allocated between the beneficiaries as set out in the Bifurcated Returns.

10 82. On this reinterpretation, taking the 2006 Year, for the franking credits to be lawfully allocated as per the Bifurcated Returns, ie between Mr Thomas and MAPL as to 91.35: 8.65, the franked distributions and the net income of the Trust must have been allocated by the Trustee in those same proportions. But if that is right, the net income could not have been allocated as per the Bifurcated Returns or the Net Income Resolutions as Applegarth J understood them.

83. In short, Declaration 1(b)(iii) cannot simultaneously mean (as per Applegarth J) that Mr Thomas gets the lion's share of the franking credits but avoids getting most of the net income (the objective of the scheme) and (as per Pagone J) Mr Thomas gets the lion's share of the franking credits but at the "cost" of also getting the lion's share of the franked  
20 distributions comprised in the net income that generated those franking credits.

### Conclusions

84. The result is that, first, once the legal flaw in Declaration 1(b)(iii) is exposed, the Declaration is inapt to create any taxable fact under *Executor Trustee*. And second, once *Executor Trustee* is removed from the equation, one can return to the correct view of Div 207 and the correct application of it to the Resolutions, as set out at [43] to [52] above.

### **6. Pagone J's approach to the 2009 Year (Thomas Nominees Proceeding)**

85. Pagone J's separate reasons in respect of the liability of Thomas Nominees Pty Ltd in the 2009 Year are heavily influenced by an attempt to construe the Resolutions to reach a result consistent with what his Honour considered to be the effect of Declaration 1(b)(iii).  
30 They do not provide an independent basis to support the decision of the Full Court in respect of any of the four tax years in question. The Commissioner's further submissions on this topic are set out in the related proceedings B62/2017 and directed to the 2009

Year.

## **7. Perram J's additional observations**

86. **The QSC declarations are 'conclusive'**. The concerns of Perram J at FCAFC [3] do not resolve or bar the appeal in any relevant way. In particular, the proposition at FCAFC [3] (that a declaration howsoever procedurally irregular is valid and binding until set aside) begs the question: having regard to the Declaration, binding on whom? The Commissioner was not a party, and any "bindingness" could only result from a particular construction or application of *Executor Trustee*. The Declaration does not have some manifest, innominate, and compelling or binding force of its own as a determination of tax liabilities.

10

87. **Rectification suit**. The second matter concerning Perram J was the rectification claim: at FCAFC [5]. The issue was not any impediment to a proper exercise of the appellate jurisdiction of the Full Federal Court. First, the rectification suit in the State Court Proceedings was dismissed. The Part IVC proceedings proceed on the basis of the Resolutions as they stand, not some hypothetical rectified form of them. Secondly, rectification is a doctrine concerned with reforming the terms of a document to accord with the true intention of parties where, for some reason, that intent was not accurately recorded in the writing. It is not a doctrine that permits a Court to re-write a document to achieve an intended result. In the present case, the proposed form of any rectified resolutions has never been identified.<sup>47</sup> Thirdly, in any event, the true subjective intent seems to have been to achieve the result set out in the Bifurcated Returns, a result simply unavailable under Div 207. No form of words by rectification can outdo the taxing statute and law, properly applied.

20

## **8. Resolution of the appeals**

88. The above submission, if accepted, would point to the decision of Greenwood J as being correct, not simply on the basis that the Respondents failed to discharge their onus, but rather that the Amended Assessments (after due allowance for the options concession) correctly reflected the application of Div 207 to the Resolutions. Accordingly, the appeal should be allowed, with costs.

---

<sup>47</sup> See *Mackenzie v Coulton* (1869) LR 8 Eq 368, 375; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, at [446] per Campbell J ("The proper form of the order identifies the precise words..."); *Bacchus March Concentrated Milk Co Ltd (In Liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410, 427 per Isaacs J.

89. Whether there is any proper issue arising from the Respondents' Cross Appeal or Notices of Contention which should see any other result in this Court or more likely call for remitter will be dealt with in reply, after the arguments have been properly articulated.

**Part VII: Statutes**

90. The relevant statutory material relied on by the Commissioner is identified as attached.

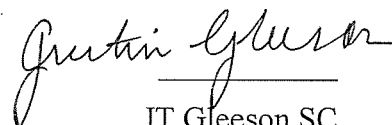
**Part VIII: Orders**

1. The appeal be allowed, with costs.
2. The proceeding be remitted to the Full Federal Court for determination according to law.

**Part IX: Estimate**

- 10 1. The appellant estimates 3 hours will be required for the presentation of the oral argument.

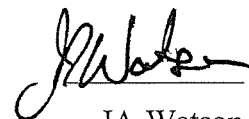
Dated: 24 November 2017.



\_\_\_\_\_  
JT Gleeson SC  
Telephone: (02) 8239 0200  
Email: justin.gleeson@banco.net.au

20

\_\_\_\_\_  
PA Looney QC  
Telephone: (07) 3236 3369  
Email: philiplooney@qldbar.asn.au



\_\_\_\_\_  
JA Watson  
Telephone: (02) 8239 0248  
Email: watson@banco.net.au

30

\_\_\_\_\_  
CM Pierce  
Telephone: (03) 9225 6235  
Email: cpierce@vicbar.com.au