

BETWEEN: **COMMISSIONER OF TAXATION FOR
THE COMMONWEALTH OF
AUSTRALIA** Appellant
AND: **TOMARAS** First Respondent
AND **TOMARAS** Second Respondent
AND **OFFICIAL TRUSTEE IN BANKRUPTCY** Third Respondent



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APPELLANT'S REPLY

Part I: Publication on the Internet

1. The appellant (**Commissioner**) certifies that this submission is in a form suitable for publication on the internet.

30 **Part II: Reply**

2. The Commissioner refers to his written submissions (**AS**) and those filed by the First Respondent (**Wife**) (**RS**).

Two recurring themes

3. A critical theme of the Wife's submissions upon which her case depends (see **RS [5], [10], [72]**) is that, once a tax-related liability is the subject of a judgment, the resulting judgment debt is not a tax-related liability, relying upon the decision of this Court in *Chamberlain v FCT* (1988) 164 CLR 502. However, that case confirms only that the Commissioner is prevented from suing on the same amount of tax (or tax-related liability) for a second time because the cause of action has merged in the judgment. The Wife's submission fails to address caselaw that shows that the underlying tax

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liability continues to exist as a tax debt (after judgment has been given) and to be regulated under the tax legislation for a range of purposes: see *DCT v Zarzycki* (1990) 21 ATR 575 at 579; *Re Mazuran; ex parte DCT* (1990) 21 ATR 758 at 767; *Re Pollack; ex parte FCT* (1991) 32 FCR 40, Pincus J at 53, and Gummow J at 58; *DCT v Meakes* [2014] NSWSC 1001 at [45]-[49]. See also s 8AAH of the TAA, which is premised upon tax-related liabilities continuing to accrue the general interest charge (GIC) even after judgment has been entered for those debts. Contrary to **RS [11]**, s 260-5 of Schedule 1 to the TAA reinforces the notion that the tax legislation provides a regime that deals with judgment debts arising from underlying (and unpaid) tax-related liabilities. The Wife fails in her attempt to use *Chamberlain* to avoid the features of the tax legislation that make tax debts unique and, in so failing, likewise must fail in her defence of this appeal.

4. A second recurring theme in the Wife's submissions is that her rights to object under Part IVC of the TAA have been "spent" or no longer exist: **RS [2], [12], [73], [81]-[84]**. The time for the Wife to object to the notices of amended assessment issued to her (CAB 12 and CAB 13) has passed: s 14ZW of the TAA. However, a taxpayer has a right to apply for an extension of the time for lodging a notice of objection pursuant to s 14ZW¹ and any refusal to extend is itself a reviewable decision; s 14ZX. Contrary to the Wife's submissions, the facts disclosed in the special case do not furnish an example of a circumstance in which the Pt IVC procedure had been spent. The Wife could still seek to challenge the tax-related liability standing behind the judgment debt (the possibility of which was contemplated at item 13 of the special case: CAB 14).

Specific responses

5. **Re RS [7]:** The Commissioner's third ground of appeal concerns, *inter alia*, whether "debt" in s 90AE(1) of the *Family Law Act 1975* (Cth) (FLA) includes "tax related liabilities" (CAB 57). The Wife seeks, without any proper basis, to confine this Court to a consideration of only whether the judgment debt against the Wife and the imposition of the GIC are within what the Wife describes as the "special category".
6. **Re RS [12]:** A taxpayer may apply to the Commissioner seeking the remission of GIC under s 8AAG of the TAA. A decision by the Commissioner declining to remit the

¹ See generally *Brown v Federal Commissioner of Taxation* (1999) 42 ATR 118, (1999) 99 ATC 4516, [1999] FCA 563.

GIC is reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

7. **Re RS [21]:** The authority referred to only serves to support the Commissioner's argument: laws designed to protect the revenue can only be seen to be at the heart of the "interests or purposes of the Sovereign".
- 10 8. **Re RS [27] to [40]:** The Wife's submissions, which focus upon the use and interpretation of the word "creditor" as between s 79 and s 90AE of the FLA, fail to recognise that in s 90AE the word "creditor" is used in the context of *substitution*. This places s 90AE in a different category from s 79: see further AS [62]-[70]. The construction advanced by the Wife would subvert the statutory scheme of Pt IVC of the TAA: see further AS [46]-[57].
- 20 9. **Re RS [50] to [60]:** The hypothetical examples postulated in the Wife's submissions provide no assistance in identifying the proper construction of s 90AE of the FLA. They fail to address the existing power of the Family Court and the Federal Circuit Court under s 80(1)(f) of the FLA to order that payments be made direct "to a public authority for the benefit of a party to the marriage". In the examples given, one party to the marriage could be ordered to make payment of a given tax liability for the benefit of the other party, achieving essentially the same outcome as mooted in the Wife's
30 submissions.
10. **Re RS [63]:** The notion that the presumption applies either to all polities or none is inconsistent with the test stated in *Bass*: see AS [18]. Moreover, the reformulated approach to the presumption does not exclude the possibility that, properly construed, general language in a provision will not apply to some members or agents of the
40 executive government but still apply to others (for example, not apply to the Governor-General but apply to statutory office holders).
11. **Re RS [67]:** The structure of the taxation legislation (and the manner in which this Court has construed and applied the legislation) reinforces the implausibility that the Parliament intended that s 90AE of the FLA should apply to the Commissioner. For example, the Commissioner has the power to amend an assessment at any time if of the
50 opinion that there had been fraud or evasion under s 170 of the ITAA 36. If s 90AE applied to the Commissioner as a creditor in respect of tax-related liabilities, then the

following circumstances could readily arise: (i) the Commissioner issues a notice of assessment against the taxpayer spouse for income tax liability in the ordinary course; (ii) the other spouse is then rendered liable for the liability in that assessment by an order under s 90AE; and (iii) the Commissioner then forms an opinion that there was fraud and evasion and issues an amended assessment to the taxpayer spouse, which assessment identifies a new tax-related liability of the taxpayer spouse. Such an assessment can be issued only against the taxpayer spouse. These circumstances could lead to the other spouse being made liable for the tax debt stated in the amended assessment (while having no rights to object and, even if such rights could be read in, facing difficulties in meeting her or his burden of proof) or the making of the amended assessment might avoid the operation of the s 90AE order making the taxpayer spouse liable for the tax-related liability stated therein. It is most unlikely that the Parliament intended that the FLA and the taxation statutes would interact so as to produce such an outcome. The more plausible explanation is that the Parliament did not intend that the power in s 90AE extend to orders directed against the Commissioner.

12. **Re RS [69]-[70]:** These submissions fail to address the point made at AS [61].
13. **Re RS [71]-[74]:** The Wife's submissions here seek to avoid the Commissioner's arguments that application of s 90AE to tax-related liabilities would subvert the tax legislation (see AS [48]-[60]) by observing that not all tax-related liabilities are covered by Part IVC. While the vast majority of tax-related liabilities fall under the Pt IVC regime, the Commissioner did not rely only upon those provisions. The task at hand turns attention to the entirety of the exhaustive code contained in the tax legislation, which is not addressed by the Wife.
14. **Re RS [75]-[77]:** The inability of substituted parties to contest the taxation debts is described as lacking in force and of no application to the "mundane" uncontested liabilities of the Wife. However, the Wife's submissions fail to appreciate that the incontestability takes two forms. First, for the reasons addressed at AS [46] and [47] the substituted person would not have any objection, review or appeal rights at all under Pt IVC of the TAA. Secondly, the nature of the statutory scheme is such that a non-original taxpayer would almost inevitably be disadvantaged due to the operation of the burden of proof provisions – see AS [55] to [57].

15. To the fraud or evasion example at AS [56], there may be added the example of an assessment concerning assessable income derived from a foreign controlled company under Pt X of the ITAA 36. A substituted taxpayer is likely to encounter severe difficulties in contesting an amended assessment relying upon such an impost, which would typically involve offshore transactions, structures and documents. The offshore company may well not be amenable to any Australian compulsive process. Further, the substituted taxpayer may not be able to rely on his or her inability to produce books and records when contesting the debt.²

16. *Re RS [85]-[89]*: The Wife's submissions substantially oversimplify the effect of the taxation statutes in suggesting that, outside the operation of Pt IVC, a taxation debt is in precisely the same position as other Crown debts. On the contrary, the taxation statutes ascribe to Commonwealth tax debts characteristics, that differ from other debts, in particular in relation to their existence, quantification, contestability, enforceability and recovery: see AS [35]-[47]. The Wife's construction of s 90AE, adopted by the Full Court, subverts that statutory scheme or code: see AS [48]-[60].

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² See, eg, *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63.