

COMMISSIONER OF TAXATION v AUSTRALIAN BUILDING SYSTEMS PTY LTD (IN LIQUIDATION) (B19/2015)

COMMISSIONER OF TAXATION v GINETTE DAWN MULLER AND JOANNE EMILY DUNN AS LIQUIDATORS OF AUSTRALIAN BUILDING SYSTEMS PTY LTD (IN LIQUIDATION) (B20/2015)

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 133

Date of judgment: 8 October 2014

Special leave granted: 17 April 2015

On 2 March 2011 administrators were appointed to Australian Building Systems Pty Ltd (“ABS”) under Part 5.3A of the *Corporations Act 2001* (Cth) (“the Corporations Act”). On 6 April 2011 the creditors of ABS resolved, under s 439C of the Corporations Act, that ABS be wound up and Ms Muller and Ms Dunne be appointed liquidators (“the liquidators”). The assets of ABS then included a property at Crestmead in Queensland. On 21 July 2011 the liquidators caused ABS to enter into a contract for the sale of the Crestmead property. ABS made a capital gain on the sale of \$1,120,000 which entered into the calculation of ABS’ assessable income of that year.

The Appellant (“the Commissioner”) argued that s 254(1)(d) of the *Income Tax Assessment Act 1936* (Cth) (“the 1936 Act”) required the liquidators to retain sufficient funds from the proceeds of the sale of the Crestmead property to pay the tax that would have become due in respect of the net capital gain arising from the disposal of the property. The liquidators argued that the requirement to withhold funds would only arise upon the issue of a valid assessment by the Commissioner.

At first instance, Logan J held that s 254 of the 1936 Act had no application to the liquidators. They were not, in the absence of any assessment, subject to any retention and payment obligation.

The Full Court of the Federal Court of Australia (Edmonds, Collier and Davies JJ) upheld the decision of Logan J that s 254(1)(d) of the 1936 Act only imposed an obligation of retention once a relevant assessment had been issued. Davies J agreed that the appeals should be dismissed, but dissented in part, opining that it was not a complete answer to the Commissioner’s case that it was apparently common ground that any assessment would issue to the company.

In both matters, the grounds of appeal include:

- The Full Court (with Davies J dissenting in part) erred in the application of section 254(1) of the 1936 Act to the case of a trustee within the meaning of s 6 of the 1936 Act who is not the trustee of a trust estate (such as a liquidator or receiver) and who derives income profits or gains (“IPG”) in a representative capacity by concluding that s 254(1) only operates in relation to IPG on which the trustee (eg. liquidator or receiver) was assessable under

Part III, Division 6 of the 1936 Act (which cannot arise unless there is a trust estate).

In both matters a Notice of Contention was filed, the grounds of which include:

- The Full Court of the Federal Court of Australia should have dismissed the appeal on the basis that the primary judge's reasoning was correct and justified the orders made by the primary judge.