

BLUEBOTTLE UK LIMITED & ORS v DEPUTY COMMISSIONER OF TAXATION & ANOR (S302/2007)

Court Appealed from: New South Wales Court of Appeal

Date of Judgment: 14 December 2006

Date of Grant of Special Leave: 25 May 2007

This appeal raises issues of statutory construction and the potential scope of the powers of the Deputy Commissioner of Taxation ("the Commissioner") under s 255 of the *Income Tax Assessment Act 1936* (Cth) ("ITAA").

The second respondent, Virgin Blue, is an Australian based corporation. Its shareholders include the second appellant, Cricket S.A., and the third appellant, Virgin Holdings, both of which are non-resident corporations. On 11 November 2005 the board of Virgin Blue passed a resolution to pay a dividend. On 12 December 2005 the first respondent, the Commissioner, issued notices to Virgin Blue, purportedly pursuant to s 255 of the ITAA, stating that Virgin Blue was to retain a total of \$93,357,900.51 to pay tax due and payable by Cricket S.A. and Virgin Holdings.

On 13 December 2005 each of Cricket S.A. and Virgin Holdings executed a deed of assignment - of its right, title and interests to receive the dividend - to the first appellant, Bluebottle. Also on 13 December 2005 Bluebottle executed in favour of Virgin Blue an irrevocable direction to pay dividends to the fourth respondent, Barfair.

On 14 December 2005 each of Cricket S.A. and Virgin Holdings gave notice to Virgin Blue of the assignments and of the irrevocable direction to pay. Later on the same day the Commissioner served notices on Virgin Blue, purportedly pursuant to s 255 of the ITAA, requiring that Virgin Blue pay to the Commissioner the amounts described in the 12 December 2005 notices.

On 15 December 2005 the appellants commenced proceedings in the Supreme Court seeking, inter alia, a declaration that the purported s 255 notices were of no force or effect, a declaration that the dividend was payable by Virgin Blue to Barfair and an order that Virgin Blue pay the dividend to Barfair forthwith.

On 14 July 2006 Gzell J made the declarations and orders sought by the appellants. The Commissioner appealed to the Court of Appeal (Mason P, Santow and Basten JJA). The Court allowed the appeal, holding, per Basten JA, that the dividend declared on 11 November 2005 created a debt on that date, or at the latest, on 16 November 2005, in favour of the non-resident shareholders (amongst others), pursuant to s 254V(2) of the *Corporations Act 2001* (Cth). From that date the company was liable to pay money to a non-resident and was therefore deemed to be a person having the control of money belonging to the non-resident, pursuant to s 255(2). The notification received from the Commissioner on 12 December 2005, identifying each non-resident taxpayer and the amount of the tax liability, was sufficient to engage the obligation under s 255(1)(b) to retain so much of the dividend due to each non-resident as was sufficient to pay the tax.

The respondent has filed a notice of contention asserting that the decision of the Court below should be affirmed on grounds that the Court below did not decide. The notice of contention issue turns (inter alia) on the terms of the assignments and the nature of the property assigned.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in allowing the appeal from the decision of the Honourable Justice Gzell made on 14 July 2006.
- The Court erred in finding that the Second Respondent "declared" the Dividend (as defined in the Affidavit of Jeffrey Robert Flick sworn on 15 December 2005) rather than "determined" the Dividend.
- The Court erred in finding that the declaration (or determination) of the Dividend by the Second Respondent gave rise to a debt incurred by the Second Respondent on 11 November 2005, or 16 November 2005 at the latest pursuant to section 254V(2) of the *Corporations Act 2001*.