



HIGH COURT OF AUSTRALIA

10 December 2015

COMMISSIONER OF TAXATION v AUSTRALIAN BUILDING SYSTEMS PTY LTD
(IN LIQUIDATION); COMMISSIONER OF TAXATION v MULLER AND DUNN AS
LIQUIDATORS OF AUSTRALIAN BUILDING SYSTEMS PTY LTD (IN
LIQUIDATION)

[2015] HCA 48

Today the High Court, by majority, dismissed appeals from the Full Court of the Federal Court of Australia. The High Court held that the retention obligation (as defined below) imposed on agents and trustees by s 254(1)(d) of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act") only arises after the making of an assessment or deemed assessment in respect of the income, profits or gains.

Section 254(1)(d) of the 1936 Act requires every agent and every trustee "to retain from time to time out of any money which comes to him or her in his or her representative capacity so much as is sufficient to pay tax which is or will become due in respect of the income, profits or gains" ("the retention obligation"). The liquidators of Australian Building Systems Pty Ltd ("ABS") caused the company to enter into a contract for the sale of a property, which gave rise to a capital gain pursuant to s 104-10 of the *Income Tax Assessment Act 1997* (Cth). In a private ruling, the Commissioner of Taxation ("the Commissioner") ruled that s 254(1)(d) of the 1936 Act required the liquidators to retain sufficient monies out of the proceeds of the sale to cover any capital gains tax liability from the time the capital gain crystallised.

ABS objected to the ruling but the Commissioner disallowed the objection. ABS appealed that decision and the liquidators also sought declaratory relief in the Federal Court of Australia. Hearing both matters concurrently, the primary judge held that s 254(1)(d) did not require the liquidators to retain money from the proceeds of the sale until an assessment had issued. The primary judge considered that s 254(1)(d) should be construed consistently with the High Court's construction of the phrase "is or will become due" in s 255(1)(b) of the 1936 Act in *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598. The Full Court of the Federal Court dismissed the Commissioner's appeals. Unlike the primary judge, the majority of the Full Court relied on the proposition that ABS was "presently entitled" to the proceeds of the sale and that any capital gains tax would be assessed to ABS, and not to the liquidators as trustees, as a result of Div 6 of Pt III of the 1936 Act. By grant of special leave, the Commissioner appealed to the High Court. The part of the appeals relating to the Full Court's reasoning with respect to Div 6 of Pt III was not contested by the respondents.

The High Court dismissed the Commissioner's appeals. The majority held that the retention obligation in s 254(1)(d), similar to the retention obligation in s 255(1)(b), only arises after an assessment or deemed assessment has been made in respect of the relevant income, profits or gains. The High Court also held that the majority of the Full Court had erred in finding that the liquidator was a "trustee of a trust estate" for the purposes of Div 6 of Pt III. A majority of the High Court further held that the majority of the Full Court erred in construing s 254 as a collecting provision which only operates where the agent or trustee is otherwise assessable.

- *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.*

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