



HIGH COURT OF AUSTRALIA

13 December 2018

COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA v TOMARAS
& ORS
[2018] HCA 62

Today the High Court answered a question of law that had been stated for the opinion of the Full Court of the Family Court of Australia, and otherwise dismissed an appeal from the decision of that Court.

Part VIII of the *Family Law Act 1975* (Cth) ("the Act") provides for spousal maintenance and the division of the property of the parties to a marriage. In proceedings with respect to the property of the parties to a marriage, s 79 provides that a court may make an order altering the interests of the parties to the marriage in the property, but that the court shall not make such an order unless it is satisfied that in all the circumstances it is just and equitable to make the order. Part VIIIAA of the Act allows a court to make an order under s 79 that is directed to, or alters, the rights, liabilities or property interests of a third party. Section 90AE(1)(b) allows the court to make an order directed to a creditor of one party to the marriage to substitute the other party to the marriage in relation to the debt owed to that creditor. Section 90AE(3) lists a number of preconditions to the making of such an order.

The first respondent ("the wife") and the second respondent ("the husband") married in 1992 and separated in 2009. During their marriage, the appellant ("the Commissioner") issued various assessments requiring the wife to pay, among other things, income tax, the Medicare levy, penalties and the general interest charge ("GIC"). The wife failed to pay the amounts assessed and did not lodge objections to the assessments. On 12 November 2009, the Commissioner obtained default judgment against the wife. On 5 November 2013, the husband was declared bankrupt. In December 2013, the wife commenced proceedings against the husband in the Federal Circuit Court of Australia. The wife sought an order pursuant to s 90AE(1)(b) that, in respect of the wife's indebtedness to the Commissioner for certain taxation related liabilities plus GIC, the husband be substituted for the wife as the debtor and the husband be solely liable to the Commissioner for the debt.

The Federal Circuit Court stated a question of law for the opinion of the Full Court of the Family Court. The question asked was whether s 90AE(1)-(2) of the Act granted the court power to make the order sought by the wife. The Full Court answered the question in the affirmative, subject to the proviso that s 90AE(1) confers power only to make an order that the Commissioner be directed to substitute the husband for the wife in relation to the debt owed by the wife to the Commissioner.

By grant of special leave, the Commissioner appealed to the High Court. The Court unanimously held that, in relation to a debt owed to the Commonwealth by a party to a marriage, s 90AE(1) confers power on the court to make an order that the Commissioner be directed to substitute the husband for the wife in relation to that debt. A majority of the Court further held that it was otherwise inappropriate to answer the question of law stated (i) without it being found, or agreed, that, within the meaning of s 90AE(3), the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage, and it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and (ii) without the court being satisfied that, in all the circumstances, it is just and equitable to make the order.

- *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.*