HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, GAGELER, KEANE AND GORDON JJ

Matter No B19/2015

COMMISSIONER OF TAXATION — APPELLANT

AND

AUSTRALIAN BUILDING SYSTEMS PTY LTD (IN LIQUIDATION) — RESPONDENT

Matter No B20/2015

COMMISSIONER OF TAXATION — APPELLANT

AND

GINETTE DAWN MULLER AND JOANNE EMILY DUNN AS LIQUIDATORS OF AUSTRALIAN BUILDING SYSTEMS PTY LTD (IN LIQUIDATION) — RESPONDENTS

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
10 December 2015
B19/2015 & B20/2015

ORDER

Each appeal is dismissed with costs.

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC, Solicitor-General of the Commonwealth with N J Williams SC and M J O'Meara for the appellant in both matters (instructed by McInnes Wilson Lawyers)

S L Doyle QC with M S Trim for the respondents in both matters (instructed by Thomson Geer)

CATCHWORDS

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)

Taxes and duties – Income tax and related legislation – Obligations of agents and trustees – Where liquidators caused company to sell property resulting in a capital gain – Whether retention obligation in s 254(1)(d) of *Income Tax Assessment Act* 1936 (Cth) arises before assessment – Whether liquidators are trustees of trust estate for the purposes of Div 6 of Pt III of Act.

Statutes – Construction – Same or similar phrases within a statute – Whether construction of a phrase in one provision controls construction of the same or similar phrase in another provision – Relevance of context and purpose.

Words and phrases – "agent", "answerable as taxpayer", "assessment", "capital gain", "collecting provision", "due", "due and payable", "income, profits or gains", "is or will become due", "owing", "sufficient", "trustee".

Income Tax Assessment Act 1936 (Cth), ss 6(1), 254, 255, Pt III, Div 6.
Income Tax Assessment Act 1997 (Cth), ss 5-5, 104-10.

FRENCH CJ AND KIEFEL J.

Introduction

1 Section 254(1)(d) of the *Income Tax Assessment Act* 1936 (Cth) ("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 question on these appeals is whether that retention obligation arises before the making of an assessment or deemed assessment in respect of the income, profits or gains. That question should be answered in the negative and the appeals dismissed.

Factual background

2 On 6 April 2011, the creditors of Australian Building Systems Pty Ltd ("ABS") resolved that it be wound up under s 439C of the *Corporations Act* 2001 (Cth) ("the Corporations Act"). Ms Ginette Muller and Ms Joanne Dunn, who had been appointed as administrators of the company on 2 March 2011, were appointed its liquidators.

3 On 21 July 2011, the liquidators caused ABS to enter into a contract for sale of real property which gave rise to a capital gain designated as a CGT event A1 under s 104-10 of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act"). The capital proceeds were $4,000,000. The cost base for the property under Div 110 of the 1997 Act was about $2,880,000. The capital gain for the purposes of s 104-10(4) of the 1997 Act was approximately $1,120,000.

4 The liquidators applied for a private ruling from the Commissioner of Taxation ("the Commissioner") in January 2012 pursuant to Div 359 of Sched 1 to the *Taxation Administration Act* 1953 (Cth) ("the Administration Act"). In their application they asked whether they had an obligation, pursuant to s 254 of the 1936 Act, to retain out of the proceeds of sale monies sufficient to cover any capital gains tax liability from the time that the capital gain crystallised or only when an assessment had issued. They also sought a ruling on whether they were required to account to the Commissioner out of the proceeds of sale for any capital gains tax liability arising from the sale. The Commissioner ruled, in May 2012, that under s 254 they were required to retain monies for any capital gains tax liability out of the proceeds of sale of an asset from the time of the crystallisation of the capital gain and that they were required to account to the Commissioner for that liability out of the proceeds of sale.

5 The liquidators objected to the ruling. Their objection was disallowed and on 5 October 2012 ABS appealed against the Commissioner's decision in the original jurisdiction of the Federal Court pursuant to s 14ZZ of the

Administration Act. The liquidators also commenced proceedings in the Federal Court on 11 October 2012 seeking declaratory relief effectively in terms of the private ruling for which they had applied[1]. The proceedings were heard concurrently by Logan J, who held that s 254 did not impose any obligation on the liquidators to retain money from the proceeds of sale of ABS's land unless and until an assessment had issued[2].

6 On 8 October 2014, the Full Court of the Federal Court dismissed the Commissioner's appeals[3]. Edmonds J, with whom Collier J agreed, held that, prior to the issue of an assessment to the liquidators, there could be no tax which "is ... due" by the liquidators in the sense of "owing". Nor, prior to that time, could it be said that tax "will become due" in the sense of owing[4]. That conclusion was linked to the proposition, not supported by the respondents to these appeals, that ABS was "presently entitled" within the meaning of Div 6 of Pt III of the 1936 Act, thus equating the liquidators to the position of trustees for the purposes of that Division[5]. Davies J did not adopt that reasoning. Her Honour held that the liquidators would be assessed in their representative capacity and that the obligation in s 254(1)(d) is to be read as referring to an amount of tax that has been assessed[6].

7 The application by Edmonds J of Div 6 of Pt III of the 1936 Act was not consonant with what was said in *Federal Commissioner of Taxation v Bamford*[7], namely that a liquidator, although included in the definition of "trustee" in s 6(1)

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1 The proceedings invoked the jurisdiction of the Court under s 1337B of the Corporations Act and s 39B of the *Judiciary Act* 1903 (Cth).

2 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 622–623 [22]. It was not necessary to decide the other issue in the case, namely whether s 254 affects the operation of ss 501, 555 and 556 of the Corporations Act.

3 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263.

4 (2014) 226 FCR 263 at 271 [20], 273 [29].

5 (2014) 226 FCR 263 at 273 [29].

6 (2014) 226 FCR 263 at 274 [34]–[35].

7 (2010) 240 CLR 481; [2010] HCA 10.

of the 1936 Act, "is not a trustee of a trust estate in any ordinary sense"[8]. The Full Court's reasoning with respect to Div 6 of Pt III was erroneous. The Commissioner's submission in that respect was not contested and should be accepted. The question upon which the parties joined issue in these appeals was whether the retention obligation could arise prior to the making of an assessment (or deemed assessment) in respect of the relevant income, profits or gains.

8 The Commissioner's appeals to this Court are made pursuant to the grant of special leave by Kiefel and Keane JJ[9].

The legislative history and framework

9 Section 254 and its companion provision s 255, which imposes retention and payment obligations on persons in receipt or control of money from non-residents, have their roots deep in the history of taxation legislation.

10 The history begins in the United Kingdom. Section 91 of the *Income Tax Act* 1799[10] applied to trustees or company officers (among other classes of person) who received income chargeable by virtue of the Act, and provided that where such persons:

> "shall be assessed by virtue of this Act, to contribute any Sum or Sums in respect of such Income, then and in every such Case it shall be lawful for every such Person who shall be so assessed, by and out of such Annual Income as shall come to his or her Hands or Hand as such Trustee ... or other Officer, to retain so much and such Part of such Annual Income as shall from Time to Time be sufficient to pay such Assessment".

That provision created an authority, not in terms an obligation, to retain funds to pay an assessment. The authority was conditioned upon the event of an assessment. Similar provision was made in income tax legislation in the United Kingdom in the 19th century[11]. Australian colonial and early State taxing

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8 (2010) 240 CLR 481 at 503 [28] citing *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592; [2005] HCA 20.

9 [2015] HCATrans 082.

10 39 Geo III, c 13.

11 *Income Tax Act* 1803 (43 Geo III, c 122), s 93; *Income Tax Act* 1805 (45 Geo III, c 49), s 103; *Income Tax Act* 1806 (46 Geo III, c 65), s 58. The 1806 Act was repealed at the end of the Napoleonic Wars and income taxation only resumed again with the *Income Tax Act* 1842 (5 & 6 Vict, c 35), which authorised retention in s 44.

statutes were influenced by the United Kingdom statutes and contained retention provisions variously worded[12].

11 Section 12 of the *Income Tax Act* 1895 (Vic) ("the 1895 Victorian Act") made every agent for any taxpayer permanently or temporarily out of Victoria and every trustee "answerable" for the doing of all acts, matters or things required to be done by the Act in order to ensure the assessment of the income belonging to the person or company represented by the agent or which is the subject of the trust or received by the agent or trustee and for paying tax in respect of it[13]. Such agents and trustees were authorised and required to retain from time to time in each year out of any money coming to them as agent or trustee[14]:

> "so much as is sufficient to pay the tax for the current year in respect of any income subject to the tax".

They were indemnified for all payments made under the Act[15]. They were also made personally liable for the tax payable in respect of any income if, while such tax remained unpaid, they disposed of the income or any fund or money received after the tax was payable from which the tax could legally have been paid[16]. The term "trustee" was given an extended definition and included officers having the administration or control of any income affected by any express or implied trust[17].

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12 *Land and Income Tax Assessment Act* 1895 (NSW), s 20, authorising the representative taxpayer to retain "so much as shall be required to indemnify him"; *Income Tax Act* 1895 (Vic), s 12(1)(c), requiring retention of monies "sufficient to pay the tax for the current year". See also *The Real and Personal Estates Duties Act* 1880 (Tas), ss 48–49; *Taxation Act* 1884 (SA), ss 17 and 26; and *Land and Income Tax Assessment Act* 1907 (WA), ss 20–22, in a similar model to that of the 1895 NSW Act; and *The Income Tax Act of 1902* (Q), s 25(iii), in a similar model to that of the 1895 Victorian Act.

13 1895 Victorian Act, s 12(1)(a).

14 1895 Victorian Act, s 12(1)(c).

15 1895 Victorian Act, s 12(1)(c).

16 1895 Victorian Act, s 12(1)(d).

17 1895 Victorian Act, s 2.

12 Section 12 of the 1895 Victorian Act was considered in *Webb v Syme*[18]. Griffith CJ described the liability of the trustee as secondary and contingent upon the beneficiary failing to pay the tax for which he was liable. The provisions of the Act requiring trustees to make returns of income were ancillary, in the nature of machinery for ensuring payment by the beneficiary[19]. Barton and O'Connor JJ described s 12 in similar terms[20]. Barton J characterised the personal liability imposed by the section as "a penalty for not keeping a reserve of income or funds in hand to satisfy the tax, until it is seen whether it is paid by or recoverable from the beneficiary."[21] On appeal the Privy Council held that s 12 made the trustee assessable "upon the same footing" as the beneficiary or company and did so "for the more convenient collection of the revenue"[22].

13 Unlike s 12(1)(a) of the 1895 Victorian Act, s 18 of the *Land and Income Tax Assessment Act* 1895 (NSW) ("the 1895 NSW Act") imposed liability directly on agents for out of State taxpayers[23] and trustees[24]. Every such "representative taxpayer"[25] was chargeable and to be subject to the same liabilities as if the relevant income had arisen or accrued to that person beneficially[26]. The representative taxpayer was authorised but not required to retain "so much as shall be required to indemnify him"[27]. Section 18 was held, in the Supreme Court of New South Wales, to do no more than "give to the

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18 (1910) 10 CLR 482; [1910] HCA 32.

19 (1910) 10 CLR 482 at 490–491.

20 (1910) 10 CLR 482 at 497–498 per Barton J, 510 per O'Connor J.

21 (1910) 10 CLR 482 at 498.

22 *Syme v Commissioner of Taxes for Victoria* (1914) 18 CLR 519 at 525; [1914] AC 1013 at 1020. Although heard as an appeal from the Supreme Court of Victoria, this case was in effect an appeal from the decision of the High Court in *Webb v Syme*, as recognised by Lord Sumner: (1914) 18 CLR 519 at 520; [1914] AC 1013 at 1015–1016.

23 1895 NSW Act, s 18(2).

24 1895 NSW Act, s 18(3).

25 As defined in the 1895 NSW Act, s 18.

26 1895 NSW Act, s 19.

27 1895 NSW Act, s 20.

Commissioners the additional right of placing upon trustees the duty of providing for the payment of income tax before they hand the balance over to the beneficiary."[28] No doubt a prudent trustee or agent would make provision to meet any assessment in order to avoid personal liability and would not require a specific legislative direction to that effect.

14 Section 52 of the first federal income tax legislation, the *Income Tax Assessment Act* 1915 (Cth) ("the 1915 Act"), was modelled on s 12 of the 1895 Victorian Act. Unlike s 12, it made no express provision for agents of taxpayers outside Australia. The retention obligation created by s 52(e) was also worded somewhat differently from that in the 1895 Victorian Act:

> "With respect to every agent and with respect also to every trustee, the following provisions shall apply:
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> ...
>
> (e) He is hereby authorized and required to retain from time to time out of any money which comes to him in his representative capacity so much as is sufficient to pay the income tax which is or will become due in respect of the income."

The personal liability provision was narrower than that imposed by the 1895 Victorian Act[29]. A similar indemnity provision was included[30]. The definition of "trustee" in the 1915 Act[31] expressly included a liquidator, who, as was said in *Joshua Bros Pty Ltd v Federal Commissioner of Taxation*[32], was "therefore, made answerable by sec 52 for the payment of income tax on income derived by him in his representative capacity."[33]

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28 *The Commissioners of Taxation v Abbey* (1901) 1 SR (NSW) (L) 4 at 6 per Walker J; see also *Miller v Simpson* (1903) 3 SR (NSW) 386 at 387 per AH Simpson CJ in Eq.

29 1915 Act, s 52(f).

30 1915 Act, s 52(g).

31 1915 Act, s 3.

32 (1923) 31 CLR 490; [1923] HCA 3.

33 (1923) 31 CLR 490 at 495 per Knox CJ, see also at 496 per Isaacs J, 501 per Rich J.

15 Separate provisions for agents and trustees on the one hand, and persons having the receipt, control or disposal of money belonging to persons resident out of Australia on the other, appeared in ss 47 and 48 of the *War-time Profits Tax Assessment Act* 1917 (Cth). The retention obligations for each class of case in that Act were relevantly identical[34]. The drafting dichotomy effected in the *War-time Profits Tax Assessment Act* was brought into the 1915 Act with the introduction of a new s 52A in 1918[35]. Section 52A was the direct legislative precursor of s 255 of the 1936 Act. Sections 52 and 52A were reproduced in ss 89 and 90 of the *Income Tax Assessment Act* 1922 (Cth) ("the 1922 Act") and substantially reproduced in ss 254 and 255 of the 1936 Act.

16 Section 47 of the *War-time Profits Tax Assessment Act* authorised the issue of an assessment against a liquidator in his representative capacity. Rich, Dixon and McTiernan JJ said in *Anderson's Industries Ltd v Federal Commissioner of Taxation*[36]:

> "But he could be assessed in his representative capacity only, and would incur only a vicarious liability which is limited and is never personal unless he disposes of assets while the tax is unpaid."

That observation, and the like observation in *Joshua Bros* concerning s 52 of the 1915 Act, were relied upon by the Commissioner against the proposition in the judgment of the Full Court that s 254 of the 1936 Act could not apply to ABS's capital gain because it must be assessed to ABS and not to the liquidators. That proposition, relying upon Div 6 of Pt III, as noted earlier, was not supported by the respondents. It is apparent that, from a time early in the history of these provisions, the personal liabilities they imposed upon "trustees", including liquidators, were in aid of the retention and remittance obligations they imposed.

17 None of the provisions requiring retention of funds in the antecedents to ss 254 and 255 expressly linked the obligation to the issue of an assessment. Nor do ss 254 and 255. That link was made by this Court in respect of the retention

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34 *War-time Profits Tax Assessment Act* 1917 (Cth), ss 47(e) and 48(c):

> "He is hereby authorized and required to retain from time to time out of any money which comes to him [in his representative capacity/on behalf of the person resident out of Australia] so much as is sufficient to pay the war-time profits tax which is or will become due [in respect of the said profits/by that person]."

35 Introduced by the *Income Tax Assessment Act* 1918 (Cth), s 35.

36 (1932) 47 CLR 354 at 366; [1932] HCA 6.

obligation in s 255(1)(b) in *Bluebottle UK Ltd v Deputy Commissioner of Taxation*[37] by the Court's construction of the words "sufficient to pay the tax which is or will become due". The same link was made by the primary judge and the Full Court in this case in respect of the retention obligation in s 254(1)(d). It is a link which is necessarily informed by the provisions of the 1936 Act under which tax became due and payable after the issue of an assessment. It is now necessary to consider the text of ss 254 and 255.

Sections 254 and 255 of the 1936 Act

18 Section 254 of the 1936 Act relevantly provides:

"**Agents and trustees**

(1) With respect to every agent and with respect also to every trustee, the following provisions shall apply:

(a) He or she shall be answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of the income, or any profits or gains of a capital nature, derived by him or her in his or her representative capacity, or derived by the principal by virtue of his or her agency, and for the payment of tax thereon.

(b) He or she shall in respect of that income, or those profits or gains, make the returns and be assessed thereon, but in his or her representative capacity only, and each return and assessment shall, except as otherwise provided by this Act, be separate and distinct from any other.

...

(d) He or she is hereby authorized and required 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.

(e) He or she is hereby made personally liable for the tax payable in respect of the income, profits or gains to the extent of any amount that he or she has retained, or should

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37 (2007) 232 CLR 598; [2007] HCA 54.

have retained, under paragraph (d); but he or she shall not be otherwise personally liable for the tax."

An indemnity provision follows. Subsections (2) and (3) are not material for present purposes.

19 Section 255 relevantly provides:

"**Person in receipt or control of money from non-resident**

(1) With respect to every person having the receipt control or disposal of money belonging to a non-resident, who derives income, or profits or gains of a capital nature, from a source in Australia or who is a shareholder, debenture holder, or depositor in a company deriving income, or profits or gains of a capital nature, from a source in Australia, the following provisions shall, subject to this Act, apply:

(a) the person shall when required by the Commissioner pay the tax due and payable by the non-resident;

(b) the person is hereby authorized and required to retain from time to time out of any money which comes to the person on behalf of the non-resident so much as is sufficient to pay the tax which is or will become due by the non-resident;

(c) the person is hereby made personally liable for the tax payable by the person on behalf of the non-resident to the extent of any amount that the person has retained, or should have retained, under paragraph (b); but the person shall not be otherwise personally liable for the tax;

(d) the person is hereby indemnified for all payments which the person makes in pursuance of this Act or of any requirement of the Commissioner."

Subsections (2) to (5) are not material for present purposes.

20 When ss 254(1)(d) and 255(1)(b) were enacted, s 204 of the 1936 Act provided that income tax would be "due and payable" sixty days after service of the notice of assessment, or where specified, on the date set out in the notice of assessment. Section 166A, providing for deemed assessments upon furnishing of returns by taxpayers who are "relevant entities", was introduced by s 30 of the

Taxation Laws Amendment Act (No 5) 1989 (Cth) and commenced operation on 17 January 1990[38].

21 Section 204 was amended on a number of occasions and by the time of its repeal made more elaborate provision for the times at which income tax becomes "due and payable". It was repealed by the *Tax Laws Amendment (Transfer of Provisions) Act* 2010 (Cth) and replaced by s 5-5 of the 1997 Act headed "When income tax is payable". The primary provision, s 5-5(2), provides that income tax is only due and payable if the Commissioner makes an assessment of income tax for the year. There is provision in s 5-5(3) for tax to have been due and payable at a time before the assessment was made. That is to ensure (presumably in the case of a late return) that general interest charges on unpaid tax begin to accrue from the same date for all taxpayers. For self-assessment entities, income tax is due and payable on the first day of the sixth month after the end of the income year[39]. For other entities it is due and payable 21 days after the "return day", being the day on or before which the taxpayer is required to lodge an income tax return with the Commissioner[40]. If the return is lodged on or before the return day, but the notice of assessment is given after the return day, the tax is due and payable 21 days after the Commissioner has given the taxpayer the notice[41].

22 The construction of s 254 is not affected by the enactment of s 166A nor by the substitution of s 5-5 of the 1997 Act for s 204 of the 1936 Act. The construction for which the respondents contended would cover the case of income tax being "due" pursuant to the giving of a notice of assessment or a deemed assessment or otherwise by the mechanisms set out in s 5-5 of the 1997 Act.

23 Consideration can now be given to the construction of the retention obligation imposed by s 255(1)(b) adopted by this Court in *Bluebottle*, and central to the respondents' argument about s 254(1)(d).

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38 *Taxation Laws Amendment Act (No 5)* 1989 (Cth), s 2(1).

39 1997 Act, s 5-5(4). Section 995-1(1) gives the term "self-assessment entity" the same meaning as "full self-assessment taxpayer", defined in the 1936 Act, s 6(1).

40 1997 Act, s 5-5(5).

41 1997 Act, s 5-5(6).

The *Bluebottle* decision

24 The *Bluebottle* decision concerned the retention obligation imposed on a publicly listed company, pursuant to s 255(1)(b), in relation to tax payable by overseas corporate shareholders on dividends which the company had declared. It is not necessary for present purposes to refer to the factual complexities and other legal issues in that case.

25 The Commissioner unsuccessfully submitted in *Bluebottle* that s 255(1)(b) should be read as speaking both of the time of assessment and of a time prior to assessment. It was sufficient, according to the Commissioner, that there be "an inchoate liability for tax" and that "the tax would become due, whether considered temporally or as a matter of probability"[42]. This Court held that the reference in s 255(1)(b) to "the tax which is or will become due by the non-resident" must be read as referring to an ascertained sum. If not read in that way, it would impose a retention obligation of undefined content on the controller of a non-resident's money. Moreover, the Commissioner could require the controller to retain more than the amount later assessed as due from the non-resident, that is, more than was sufficient to pay the tax which is or would become due[43]. Their Honours said[44]:

> "Until the tax payable by the non-resident has been assessed it is not possible to say more than that there *may* be tax due by the non-resident. It is not possible to say that tax *is* due or that tax *will become* due. The prediction that tax *may* be due (and any prediction of its likely amount) may be able to be made with more or less certainty by a person who is armed with a deal of information, but there is no reason to suppose that the controller of a non-resident's money would ordinarily, let alone invariably, have that information and be in a position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives." (emphasis in original)

The Court concluded that par (b) of s 255(1) should be read as referring to an amount of tax that has been assessed. The phrase "tax which ... will become due" was to be understood as referring to tax which, although assessed, was not yet due for payment[45]. No challenge was made to the correctness of the decision in

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42 (2007) 232 CLR 598 at 626–627 [77].

43 (2007) 232 CLR 598 at 627 [78].

44 (2007) 232 CLR 598 at 627 [79].

45 (2007) 232 CLR 598 at 627 [80].

Bluebottle in these appeals, rather it was sought to distinguish the operation of s 255 from that of s 254.

26 The considerations which moved the Court to that construction of s 255(1)(b) are, having regard to their textual setting, equally applicable to the retention requirement in s 254(1)(d). The proposition "that content can be given to the obligation imposed by s 255(1)(b) only if an assessment has issued"[46] is true also of the obligation imposed by s 254(1)(d). Against that background, it is necessary to consider the contending constructional arguments about the operation of s 254(1)(d).

The construction of s 254(1)(d)

27 The Commissioner submitted that it is an error to treat decisions on the construction of a phrase in one section as controlling the construction of the same or a similar phrase in another section and cited *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*[47]. That case has no bearing on the present appeals. The passage cited made no more than the obvious point that the courts of one State in construing its legislation are not required to follow slavishly judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. On the other hand, an interpretation by this Court of a particular provision of an Act is a powerful indicator of the correct interpretation of a provision of the same Act which serves similar purposes and uses identical or substantially similar language. That is not to say it is determinative if a different construction is required by the text, context and purpose of the other provision. The proposition is not new. In *Clyne v Deputy Commissioner of Taxation*[48] Mason J, with whom Aickin and Wilson JJ agreed, accepted that there is a presumption that in a statute the same word is used with the same meaning albeit the presumption "readily yields to the context"[49]. He acknowledged judicial statements to the effect that the presumption has little force in Income Tax Acts because they deal with a wide variety of topics[50] but discounted them as having "little value when we are examining the possibility that a word is used in different senses in one section of such an Act."[51] The general approach is

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46 (2007) 232 CLR 598 at 633 [97].

47 (2008) 233 CLR 259 at 270 [31]; [2008] HCA 5.

48 (1981) 150 CLR 1; [1981] HCA 40.

49 (1981) 150 CLR 1 at 15.

50 (1981) 150 CLR 1 at 15–16.

51 (1981) 150 CLR 1 at 16.

applicable to the use of the term "due" in the 1936 Act to give content to the retention obligations in ss 254 and 255, two adjacent provisions serving the same general purposes and sharing a common legislative history.

28 *Clyne* concerned the interpretation of the term "amount due by the taxpayer" as used in the former statutory garnishee provision, s 218(1)(i) of the 1936 Act[52]. Mason J said that the correct view was that "income tax is due when it is assessed and notice is served of that assessment and that the tax does not become payable before the date fixed by s 204."[53] He quoted from *George v Federal Commissioner of Taxation*[54] for the proposition that "tax is only due after it is 'assessed'"[55]. On the basis of *Clyne*, tax could be "due" under the 1936 Act but not "payable" even though an assessment had been issued. That is because under the 1936 Act payment was not required until the expiry of the time fixed for payment by the assessment[56].

29 The Commissioner's reliance upon *Clyne*, as supportive of his construction of s 254(1)(d), was, with respect, misplaced. As Gibbs CJ said in *Clyne*[57]:

> "At the latest when tax is assessed it becomes a debt due to the Crown although it is not payable until the later date specified in the notice of assessment."

He pointed, by way of example, to the use of the term "due and payable" in the payment obligation in s 255(1)(a) and contrasted it with the word "due" in the retention obligation imposed by s 255(1)(b)[58].

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52 Section 218 was repealed by the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act* 2006 (Cth).

53 (1981) 150 CLR 1 at 16.

54 (1952) 86 CLR 183 at 207 per Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ; [1952] HCA 21.

55 (1981) 150 CLR 1 at 17.

56 1936 Act, s 204.

57 (1981) 150 CLR 1 at 9.

58 (1981) 150 CLR 1 at 10.

30 An understanding of the term "tax which is or will become due" in s 254(1)(d) as referring to tax which has been assessed and is or will become payable, is therefore consistent with an established interpretation of the word "due" as used in the 1936 Act. The words "or will become" may have an element of surplusage but any argument against the Full Court's construction of s 254(1)(d) on that basis would also be good for s 255(1)(b).

31 The Commissioner's construction was advanced substantially on the basis that it made a better fit with the class of case to which s 254 applies and with the nature and timing of the obligations imposed by s 254(1)(a) and (b) than the construction appropriate to s 255(1)(b). The Commissioner argued that the controller or holder of monies under s 255 may be a complete stranger to the derivation of the income, profits or gains the subject of the tax. By way of contrast the agent or trustee has derived the income, profits or gains in a representative capacity or by virtue of their agency. The payment obligations imposed by s 255 engage only when the tax of the non-resident has become "due and payable by the non-resident". The liability under s 254 arises at the point of derivation of the income, profits or gains by the agent or trustee.

32 Then it was said that the nature of the obligations imposed by ss 254 and 255 differs. Section 255, unlike s 254, does not make the controller "answerable as a taxpayer". Section 254 was said to assimilate the role of the agent or trustee to that of a taxpayer by giving the Commissioner remedies against the property controlled, managed or possessed by the agent or trustee that he would have against the property of any taxpayer, in a way not reflected in s 255. That submission, with respect, does not warrant the construction as to the retention obligation for which the Commissioner contended and in particular, the personal liability attached to the obligation by s 254(1)(e). Moreover, on the Commissioner's proposed construction, a taxpayer who conducted his or her business through an agent would be placed in a position different from that of an ordinary taxpayer.

33 It may be accepted that the position of agent and trustee in s 254 is different from that of the controller of a non-resident's money in s 255 but this does not provide an answer to the question of when the obligation to retain arises. A differential construction of s 254 in that regard would provide the Commissioner with a level of security not provided by s 255.

34 The Commissioner argued that while tax is "due" in the sense of "owing" only after it is assessed, taxpayers have an obligation to pay tax on income derived during the course of an income year. Although assessments are usually only made annually, s 168 of the 1936 Act confers a power to assess at any time. That may be accepted, but it does not provide any specific support for the Commissioner's preferred construction.

35 The Commissioner submitted that the agent or trustee is likely to have or acquire much greater familiarity with the taxation affairs of the principal or beneficiary than the controller or holder of a non-resident's money with the taxation affairs of the non-resident. That is a statement of likelihood. It does not purport to cover the full range of agent and trustee relationships to which s 254 applies. Nor could it. While these appeals concern the position of liquidators of a company with investigative powers under the Corporations Act, s 254 applies to a much larger class of persons who derive income, profits or gains in a representative capacity. The respondents pointed to the examples of livestock agents selling cattle or sheep, agents selling collectibles at auctions and retail selling agents generally.

36 There was a statement of general likelihood also implicit in the Commissioner's submission that the Full Court's construction would render an agent or trustee to whom s 254 applies "vulnerable" to calls from the principal or beneficiary for payment over of monies held by the agent or trustee prior to the making of an assessment. The term "vulnerable" is not apposite to describe the position of an agent or trustee who may be called upon to make payments to a principal or beneficiary in accordance with his or her rights and the duties of the agent or trustee.

37 The Commissioner relied upon observations in *Bluebottle* about the retention obligation in s 52(e) of the 1915 Act, a precursor of s 254(1)(d). The Court said that s 52(e) operated in a context "radically different" from that provided by s 255 of the 1936 Act[59]. Section 52(a) of the 1915 Act made the agent "answerable as taxpayer" in effectively the same terms as s 254(1)(a). The retention authority and requirement created by s 52(e) related to tax due "in respect of the income" as if the amounts with which the agent dealt both founded the relevant taxation liability and marked its "outer boundary"[60]. The agent's personal liability for tax depended upon him paying away money from which the tax could be paid after the Commissioner had required him to make a return or "while the tax remains unpaid"[61]. The Court also observed that expressions similar to those used in s 52 of the 1915 Act were used in s 52A, the direct legislative antecedent of s 255[62]. In the end, as the Court said, the legislative

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59 (2007) 232 CLR 598 at 629 [84].

60 (2007) 232 CLR 598 at 629 [84].

61 (2007) 232 CLR 598 at 629 [84].

62 (2007) 232 CLR 598 at 630 [85].

history provided only limited assistance to the resolution of the questions before the Court about the application of s 255[63].

38 The Court made no observation about s 52 of the 1915 Act or s 89 of the 1922 Act or s 254 of the 1936 Act which indicated that it would have taken a different view of the construction of the retention obligation in each of those sections from the view it took of the retention obligation in s 255(1)(b). The term "outer boundary" merely reflected the reality that the agent or trustee cannot retain more than the money which the agent or trustee has received in his or her representative capacity. Subject to the "outer boundary" exceeding the taxpayer's liability, the agent or trustee must retain an amount "sufficient" to pay the tax which is or will become due.

39 The Commissioner submitted that the word "sufficient" in s 254(1)(d) does not require "nominal equivalence"[64] but indicates, consistently with a continuing retention obligation, that the future tax liability may not be known with precision. Plainly, however, the ordinary meaning of the word "sufficient" is entirely consistent with the proposition that the retention obligation arises only upon the making of the relevant assessment. It may be accepted that there is a difference between the immediate statutory contexts of the retention obligations in ss 254 and 255 respectively. Those differences, however, do not open a logical pathway to the construction of s 254(1)(d) for which the Commissioner contends.

40 On the Commissioner's construction the agent or trustee would be burdened with a continuing obligation to retain sufficient money to pay at any time the amount of tax that would be payable upon a notional assessment made at that time. Losses and deductions would have to be factored in to avoid the agent or trustee exceeding the retention authority conferred by s 254(1)(d). Linked to the continuing obligation would be a continuing and variable personal liability defined by reference to the difference between what the agent or trustee has retained and what would have been sufficient to pay the relevant tax at that time. It is no answer to the practical difficulties attendant upon the Commissioner's construction to say that adjustments could be made as the agent or trustee became aware of the existence of losses and deductions. Neither the retention obligation nor the personal liability imposed by s 254(1)(e) is limited by the state of the

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63 (2007) 232 CLR 598 at 632 [91].

64 A term taken from the judgment of Allsop CJ in *Federal Commissioner of Taxation v Resource Capital Fund IV LP* (2013) 215 FCR 1 at 4 [11] in relation to the retention obligation in s 255 applied to foreign currency. Sufficiency did not require "nominal equivalence" of the money in Australian dollars.

agent or trustee's knowledge of the true tax position of the principal or beneficiary.

41 Counsel for ABS submitted that the legislation imposes a personal liability on the agent or trustee which is confined by the words "to pay tax which is or will become due". That imposition, on his submission, required for its operation certainty as to the amount of the tax due. The section does not impose any personal liability in respect of a failure to comply with s 254(1)(a) or (b). The personal liability has a narrower compass. That submission should be accepted.

42 The Commissioner's submissions pointed to the treatment by s 254 of agents and trustees as notional taxpayers, asserted the consistency of his construction with that treatment and pointed to adverse consequences flowing from the Full Court's construction. His textual and contextual submissions cannot overcome the weight of the considerations which supported the construction of s 255(1)(b) in *Bluebottle*. They are equally applicable to the same language in s 254(1)(d). The acceptance of the construction of s 254(1)(d) for which the Commissioner contends would produce such a marked difference between that provision and the almost identically worded language of s 255(1)(b) that nothing less than strong contextual support would justify it. The matters of context referred to by the Commissioner do not justify this construction.

43 Having regard to the text, context and purpose of s 254 and the considerations which moved this Court to its construction of s 255(1)(b) in *Bluebottle*, the Full Court's construction of s 254(1)(d) should be accepted.

Conclusion

44 For the above reasons the appeals should be dismissed with costs.

45 GAGELER J. These appeals raise an important question as to the construction of s 254 of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"), which provides, "[w]ith respect to every agent and with respect ... to every trustee", that he or she is "answerable as taxpayer for the doing of all such things as are required to be done by virtue of [that] Act in respect of the income, or any profits or gains of a capital nature, derived by him or her in his or her representative capacity, or derived by the principal by virtue of his or her agency, and for the payment of tax thereon"[65].

46 The term "trustee" for the purpose of s 254 takes its meaning from the definition in the 1936 Act[66]:

> "***trustee*** in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, includes:
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> (a) an executor or administrator, guardian, committee, receiver, or liquidator; and
>
> (b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability".

The term "agent" is defined[67], but not in terms now relevant.

47 By force of s 254, an agent or trustee: is obliged "in respect of that income, or those profits or gains, [to] make the returns and be assessed thereon" ("the assessment obligation")[68]; is authorised and required "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")[69]; and is "made personally liable for the tax payable in respect of the income, profits or

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65 Section 254(1)(a) of the 1936 Act.

66 Section 6(1) of the 1936 Act.

67 Section 6(1) of the 1936 Act.

68 Section 254(1)(b) of the 1936 Act.

69 Section 254(1)(d) of the 1936 Act.

gains to the extent of any amount that he or she has retained, or should have retained" ("the taxation liability")[70].

48 Within the scheme of the 1936 Act, "assessment" is "the ascertainment ... of the tax payable"[71] and is "the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case"[72]. From returns and from other information in the Commissioner's possession, the Commissioner of Taxation must make an assessment of the amount of income tax payable by a taxpayer[73] (being "a person deriving income or deriving profits or gains of a capital nature"[74]), and may make an assessment of the amount of tax which any person is liable to pay under the 1936 Act whether or not that person meets the description of a taxpayer[75]. The ordinary rule is that income tax is only "due and payable" by an entity if the Commissioner makes an assessment of the income tax that is payable by that entity for a financial year[76].

49 The question in the appeals is whether the retention obligation is imposed on an agent or trustee before the Commissioner makes an assessment of the amount of tax payable on income or capital gains derived by that agent or trustee in his or her representative capacity or derived by the principal by virtue of his or her agency.

50 For the appellant Commissioner, it is argued that the retention obligation extends to retaining money in anticipation of an assessment being made. Tax is "due" when it is assessed. Tax "which is ... due" is tax which has been assessed and which remains unpaid. Tax "which ... will become due" is tax which will be assessed in the future.

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70 Section 254(1)(e) of the 1936 Act.

71 Section 6(1) of the 1936 Act, pars (a)-(d) of the definition.

72 *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 252; [1963] HCA 51.

73 Section 166 of the 1936 Act.

74 Section 6(1) of the 1936 Act.

75 Section 169 of the 1936 Act.

76 Section 5-5(2) of the *Income Tax Assessment Act* 1997 (Cth).

51 For the respondents, it is argued that the retention obligation is limited to retaining money after an assessment has been made. Tax is "due" when it is assessed and payable. Tax "which is ... due" is tax which has been assessed and which remains unpaid after it has become due for payment. Tax which "will become due" is tax which has been assessed and which is not yet due for payment.

52 That the question has not squarely arisen in the prior case law is surprising given that s 254: applies to all agents and trustees; has stood substantially unaltered since the enactment of the 1936 Act; and has a provenance which can be traced back through the *Income Tax Assessment Act* 1915 (Cth)[77] ("the 1915 Act") to the *Income Tax Act* 1895 (Vic)[78]. There were references to the operation of the earlier in time of those predecessor Acts in a case in 1910[79] and to the later of them in a case in 1923[80]. However, neither case was addressed to the present question. Cumulatively, they are insufficient to allow it to be said that the language of s 254 had in any way relevant to the question acquired a settled meaning, or been fixed with a certain application, at the time of the enactment of the 1936 Act. In a case arising under the 1936 Act, s 254 was described as amongst a group of provisions interpreted as imposing a liability on executors "only *quoad* assets and as meaning by assessment to impose a debt owing by the estate"[81].

53 The respondents' argument accords to the retention obligation in s 254 the meaning attributed in *Bluebottle UK Ltd v Deputy Commissioner of Taxation*[82] to the similarly worded retention obligation in s 255 of the 1936 Act, by which "every person having the receipt control or disposal of money belonging to a non-resident, who derives income ... from a source in Australia" is authorised and required "to retain from time to time out of any money which comes to the person on behalf of the non-resident so much as is sufficient to pay the tax which

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77 Section 52(e).

78 Section 12(c).

79 *Webb v Syme* (1910) 10 CLR 482 at 490, 497-498, 507; [1910] HCA 32.

80 *Joshua Bros Pty Ltd v Federal Commissioner of Taxation* (1923) 31 CLR 490 at 495, 496; [1923] HCA 3.

81 *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 42; [1958] HCA 2.

82 (2007) 232 CLR 598; [2007] HCA 54.

is or will become due by the non-resident"[83]. Of the wording of that retention obligation in s 255, it was said in *Bluebottle* that[84]:

> "When [it] refers to 'the tax which is or will become due by the non-resident' it must be read as referring to an ascertained sum. If the paragraph is not read in that way, the obligation to retain money which is imposed on the controller is an obligation of undefined content. It is undefined because all that may be retained (the controller 'is hereby authorised … to retain') 'out of any money which comes to him on behalf of the non-resident' is *sufficient* to pay the tax which is or will become due. And it is *that* amount (and only that amount) which the controller is obliged to retain."

54 The reasoning in *Bluebottle* continued[85]:

> "Until the tax payable by the non-resident has been assessed it is not possible to say more than that there *may* be tax due by the non-resident. It is not possible to say that tax *is* due or that tax *will become* due. The prediction that tax *may* be due (and any prediction of its likely amount) may be able to be made with more or less certainty by a person who is armed with a deal of information, but there is no reason to suppose that the controller of a non-resident's money would ordinarily, let alone invariably, have that information and be in a position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives."

55 The conclusion in *Bluebottle* was that the wording of the retention obligation in s 255[86]:

> "should be read as referring to an amount of tax that has been assessed. The phrase 'tax which … will become due' is to be understood as referring to tax which, although assessed, is not yet due for payment."

It was noted that '"[t]he word "due" is ambiguous; it can mean owing, although not payable until some future date, or it can mean presently payable"'[87]. It was

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83 Section 255(1)(b) of the 1936 Act.

84 (2007) 232 CLR 598 at 627 [78] (emphasis in original).

85 (2007) 232 CLR 598 at 627 [79] (emphasis in original).

86 (2007) 232 CLR 598 at 627 [80].

87 (2007) 232 CLR 598 at 628 [81], quoting *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 8; [1981] HCA 40.

explained that, as the word is used in the expression of the retention obligation in s 255, "the requirement for specifying the amount of money that meets that description requires that the word 'due' is read as meaning assessed as owing"[88].

56 There are differences between ss 254 and 255. Indeed, the context in which the predecessor to s 254's retention obligation appeared in the 1915 Act was described in *Bluebottl*e as "radically different from that provided by s 255 of the 1936 Act"[89]. The differences caution against treating what was said in *Bluebottle* about the retention obligation in s 255 as providing an automatic answer to the present question about the retention obligation in s 254.

57 The most significant of the differences is that the assessment obligation in s 254 removes much of the force of what was said in *Bluebottle* about the difficulty of the person on whom the retention obligation is imposed being authorised and required to retain an unascertained amount. Unlike the controller of the money of a non-resident, there is reason to suppose that an agent or trustee will be in a position to make a prediction of the amount of tax which will be ascertained by assessment to be payable on income or a capital gain derived by that agent or trustee in his or her representative capacity or derived by the principal by virtue of his or her agency. That is because the agent or trustee has a statutory obligation to make a return in respect of that income or capital gain so as to be assessed on it.

58 I am nevertheless persuaded that the respondents' argument is to be preferred. The better view is that the retention obligation in s 254, like the retention obligation in s 255, is limited to retaining money after an assessment has been made.

59 First, it fits with the structure of s 254 in giving the retention obligation an operation sequential to the performance of the assessment obligation. The content of the retention obligation is fixed by the assessment made in consequence of performance of the assessment obligation. The retention obligation then conforms to the taxation liability. The amount authorised and required to be retained out of any money which comes to the agent or trustee in his or her representative capacity following assessment is no more and no less than the amount for which the agent or trustee is made personally liable as a result of the assessment.

60 Second, it produces certainty as to the total amount which the agent or trustee is authorised and required to retain in performance of the retention obligation. The total amount is fixed by the assessment. The certainty produced

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88 (2007) 232 CLR 598 at 628 [81].

89 (2007) 232 CLR 598 at 629 [84].

by the assessment is not just as to the extent of the statutory obligation to retain. Importantly, it is also as to the extent of the modification of the contractual or fiduciary rights and obligations of the agent or trustee wrought by the statutory authority to retain. The word "sufficient" is not, I think, indicative of a need on the part of the agent or trustee to estimate an amount of tax to be assessed in the future. In s 254, as in s 255, the word is more naturally referable to the cumulative nature of the authority and obligation to retain from time to time. The word "sufficient" acknowledges that the obligation is performed, and the authority is exhausted, once the total amount of the money retained is enough to pay the amount of tax that has been assessed.

61 Third, it results in the lesser fiscal distortion of legitimate commercial choice between business models. A taxpayer carrying on business alone is not ordinarily obliged to quarantine money as it is received for the future payment of tax. A taxpayer carrying on business through an agent would be at a disadvantage were the agent required to retain money for the future payment of tax as it is received in his or her representative capacity.

62 Fourth, it results in s 254 providing a measure of protection of the revenue commensurate with the measure of protection provided by s 255. Within the scheme of the 1936 Act, there is nothing incongruous about a person being obliged to retain an amount sufficient to pay the assessed but unpaid tax of another, yet not being obliged to retain an amount sufficient to pay the tax of another which is yet to be assessed. Neither in s 254 nor in s 255 is the money to which the retention obligation attaches necessarily linked to the income or capital gain in respect of which the tax in question is or will become due. The obligation attaches to "any money" which from time to time "comes to" the person in a relevant capacity. In s 254, as in s 255, the obligation attaches to any money which so comes to the person after the tax in question has been assessed.

63 Finally, in its application to liquidators, it minimises the potential for disharmony between the obligations and liabilities of a liquidator under s 254 of the 1936 Act and the obligations of a liquidator and the rights of creditors under Ch 5 of the *Corporations Act* 2001 (Cth). One does not reach the question, which the Commissioner seeks to have remitted for determination, as to "whether the operation of ss 501, 555 and 556 of the Corporations Act is affected by s 254 of the [1936 Act], such that the [C]ommissioner enjoys a form of priority because of s 254, notwithstanding what would otherwise be the effect of these provisions of the Corporations Act in a winding up"[90].

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90 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 617 [13(a)].

64 For these reasons, I agree in substance with Logan J at first instance[91] and Davies J in the Full Court of the Federal Court[92]. In relation to the reasoning of Edmonds and Collier JJ in the Full Court, I consider that the uncontested submissions of the Commissioner recorded by Keane J should be accepted for the reasons given by Keane J.

65 The appeals should be dismissed with costs.

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91 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614.

92 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 274 [34]-[35].

66 KEANE J. Section 254(1)(d) of the *Income Tax Assessment Act* 1936 (Cth) ("the Assessment Act") requires that an agent or trustee must retain 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" derived by him or her in that capacity. A liquidator is a "trustee" as defined in s 6(1) of the Assessment Act.

67 The issue in these appeals is whether, upon the derivation of a capital gain by a liquidator in that capacity, the liquidator incurs a simultaneous obligation to retain from money in his or her hands an amount sufficient to pay tax that may be assessed on that gain, or whether that obligation arises only when an assessment of the tax owing by the liquidator has been issued by the Commissioner of Taxation ("the Commissioner"). If the words "tax which … will become due" are properly construed as "tax which … will be assessed", then this issue must be resolved in favour of the Commissioner.

68 In *Bluebottle UK Ltd v Deputy Commissioner of Taxation*[93], this Court considered s 255(1)(b) of the Assessment Act, which obliges a person having control of money belonging to a non-resident of Australia ("the controller") who has derived income, profits or gains from sources in Australia "to retain … so much as is sufficient to pay the tax which is or will become due by the non-resident". The Court held that the retention obligation imposed by s 255(1)(b) did not arise until the liability to tax of the non-resident taxpayer had been assessed by the Commissioner. It will be seen that the ordinary meaning of "tax due" in the Assessment Act is tax assessed as owing[94]. The Court construed[95] the words "the tax which is or will become due", in their context, as follows[96]:

> "Paragraph (b) of s 255(1) should be read as referring to an amount of tax that has been assessed. The phrase 'tax which … will become due' is to be understood as referring to tax which, although assessed, is not yet due for payment."

69 In this case, the primary judge, and Davies J in the Full Court, regarded the decision in *Bluebottle* as leading to the conclusion that the phrase "tax which is or will become due" in s 254(1)(d) has the same meaning as it has in

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93 (2007) 232 CLR 598; [2007] HCA 54.

94 *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 16, 24; [1981] HCA 40.

95 (2007) 232 CLR 598 at 627-628 [80]-[82].

96 (2007) 232 CLR 598 at 627 [80].

s 255(1)(b); that is, "tax which has been assessed or which, although assessed, is not yet due for payment."

70 That conclusion does not give effect to the ordinary meaning of the language of s 254(1)(d), or recognise the substantial textual and contextual differences between ss 254 and 255. Nor does it reflect the purpose of s 254(1)(d) to ensure that an agent or trustee retains sufficient money to meet any liability to tax which is assessed as owing on income, profits or gains derived in that capacity. The textual and contextual considerations which led this Court in *Bluebottle* to adopt a meaning other than the ordinary meaning of "tax which is or will become due" do not constrain the meaning of s 254(1)(d).

71 The retention obligation in s 254(1)(d) arises in relation to money in the hands of the liquidator as and when income, profits or gains are derived, and in respect of which tax has been assessed or will be assessed. Accordingly, the appeals should be allowed.

Factual background

72 The respondents in Matter No B20 of 2015, Ms Ginette Muller and Ms Joanne Dunn, are the liquidators of Australian Building Systems Pty Ltd ("ABS"), the respondent in Matter No B19 of 2015. In 2000, ABS purchased a property at 118-128 Magnesium Drive, Crestmead, Queensland ("the Crestmead property"). On 2 March 2011, ABS was placed into voluntary administration and Ms Muller and Ms Dunn were appointed administrators. On 6 April 2011, the creditors of ABS resolved that the company should be wound up, and Ms Muller and Ms Dunn were appointed liquidators ("the liquidators").

73 In July 2011, the liquidators arranged for the sale of the Crestmead property. That sale resulted in a capital gain of approximately $1.12 million, pursuant to s 104-10 of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act").

74 In January 2012, the liquidators applied for a private ruling from the Commissioner, seeking determination of three issues: first, whether s 254 of the Assessment Act obliges the liquidators to account to the Commissioner, out of the proceeds of sale of an asset that belonged to ABS before the liquidation, any capital gains tax liability that crystallises on the sale of that asset; secondly, if so, whether the liquidators are obliged to retain a sufficient amount of money to pay that tax liability only once an assessment issues from the Commissioner; and thirdly, if the obligation to retain that amount does not arise only once an assessment is issued, whether the amount is to be retained at crystallisation of the capital gain.

75 The Commissioner ruled that under s 254 the liquidators were required to account to the Commissioner for capital gains tax liability arising from the sale

of an asset of ABS out of the proceeds of that sale, and were obliged to retain sufficient money to do so upon the crystallisation of the capital gain.

76 In July 2012, ABS lodged an objection to the Commissioner's ruling. In August 2012, that objection was disallowed.

The course of proceedings

77 On 5 October 2012, ABS commenced proceedings in the Federal Court appealing against the decision to disallow the objection. On 11 October 2012, the liquidators commenced a further set of proceedings in the Federal Court seeking declarations in the liquidators' favour corresponding to the issues presented to the Commissioner in the private ruling.

78 The primary judge, Logan J, heard the two matters concurrently. Before the primary judge, the issues between the parties were reformulated somewhat so that the following questions were addressed[97] by his Honour:

> "(a) whether the operation of ss 501, 555 and 556 of the Corporations Act is affected by s 254 of the [Assessment Act], such that the commissioner enjoys a form of priority because of s 254, notwithstanding what would otherwise be the effect of these provisions of the Corporations Act in a winding up; and
>
> (b) whether an obligation under s 254 arises upon the occurrence of a [capital gains tax] event (here, the disposal of the Crestmead property) or only upon the issuing of a notice of assessment?"

79 The primary judge resolved question (b) in favour of ABS and the liquidators[98], as a result of which it was not necessary to decide question (a). It is to be emphasised that question (a) was not the subject of argument in these appeals. The reasons which follow should not be taken as bearing in any way upon any question of priority between creditors which may be said to attend the operation of s 254(1)(d).

80 The primary judge declared that, in the absence of an assessment, the liquidators are not required to account to the Commissioner for any capital gains tax liability that arises on the sale of an asset of ABS or to retain a sum sufficient

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97 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 617 [13].

98 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 623 [25].

to pay the amount of that liability. His Honour quashed the Commissioner's decision.

81 The Commissioner appealed to the Full Court of the Federal Court. The appeals were dismissed[99].

82 By a grant of special leave, the Commissioner appealed to this Court in both matters[100].

The legislation

83 Section 254 of the Assessment Act provides relevantly that:

> "(1) With respect to every agent and with respect also to every trustee, the following provisions shall apply:
>
> (a) He or she shall be answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of the income, or any profits or gains of a capital nature, derived by him or her in his or her representative capacity, or derived by the principal by virtue of his or her agency, and for the payment of tax thereon.
>
> (b) He or she shall in respect of that income, or those profits or gains, make the returns and be assessed thereon, but in his or her representative capacity only, and each return and assessment shall, except as otherwise provided by this Act, be separate and distinct from any other.
>
> (c) If he or she is a trustee of the estate of a deceased person, the returns shall be the same as far as practicable as the deceased person, if living, would have been liable to make.
>
> (d) He or she is hereby authorized and required 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.

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99 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263.

100 [2015] HCATrans 082 (17 April 2015).

(e) He or she is hereby made personally liable for the tax payable in respect of the income, profits or gains to the extent of any amount that he or she has retained, or should have retained, under paragraph (d); but he or she shall not be otherwise personally liable for the tax.

(f) He or she is hereby indemnified for all payments which he or she makes in pursuance of this Act or of any requirement of the Commissioner."

84 Section 254 of the Assessment Act has precursors in s 52 of the *Income Tax Assessment Act* 1915 (Cth) ("the 1915 Act"), which became s 89 of the *Income Tax Assessment Act* 1922 (Cth), as well as in s 12 of an earlier colonial Victorian Act, the *Income Tax Act* 1895 (Vic). The retention obligation in s 254(1)(d) facilitates the payment of tax, by requiring the trustee to "keep back out of the trust [or agency] receipts enough to pay the tax if it is not obtained from the beneficiary [or principal] and demand is made on himself"[101]. The personal liability imposed by s 254(1)(e) is, in effect, "a penalty for not keeping a reserve of income or funds in hand to satisfy the tax"[102]. These measures have the object of "ensuring payment of the tax" by making the agent or trustee "effectively answerable for its payment"[103] if it is not paid by the principal or beneficiary.

85 Section 255 is relevantly in the following terms:

"(1) With respect to every person having the receipt control or disposal of money belonging to a non-resident, who derives income, or profits or gains of a capital nature, from a source in Australia ... the following provisions shall, subject to this Act, apply:

(a) the person shall when required by the Commissioner pay the tax due and payable by the non-resident;

(b) the person is hereby authorized and required to retain from time to time out of any money which comes to the person on behalf of the non-resident so much as is sufficient to pay the tax which is or will become due by the non-resident;

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101 *Webb v Syme* (1910) 10 CLR 482 at 497; [1910] HCA 32.

102 *Webb v Syme* (1910) 10 CLR 482 at 498.

103 *Webb v Syme* (1910) 10 CLR 482 at 507.

(c) the person is hereby made personally liable for the tax payable by the person on behalf of the non-resident to the extent of any amount that the person has retained, or should have retained, under paragraph (b); but the person shall not be otherwise personally liable for the tax;

(d) the person is hereby indemnified for all payments which the person makes in pursuance of this Act or of any requirement of the Commissioner."

86 A number of textual and contextual differences between ss 255(1)(b) and 254(1)(d) may be noted. First, under s 254(1)(a), the agent or trustee is "answerable as taxpayer" for the observance of the Act in respect of the income, profits or gains derived by him or her in his or her representative capacity, "and for the payment of tax thereon." Under s 254(1)(a) and (e), the agent or trustee is personally liable as a taxpayer to pay the tax payable in respect of the income, profits or gains derived by him or her, albeit only to the extent that he or she has retained or should have retained a sum sufficient to pay the tax in respect of which s 254(1)(b) obliges him or her to be assessed.

87 Secondly, the obligation imposed on the agent or trustee by s 254(1)(b), to make returns of the income, profits or gains and to be assessed on that income or those profits or gains, is an important point of difference. Section 254(1)(b) proceeds on the evident assumption that the assessment to tax to which it refers will reflect the content of the returns to be furnished by the agent or trustee in relation to the derivation of income, profits or gains. That assumption accords with s 166 of the Assessment Act, which provides that the Commissioner must make an assessment from, inter alia, the returns of "the amount of the taxable income … of any taxpayer, and of the tax payable thereon".

88 Thirdly, it is the "derivation" by the agent or trustee of income, profits or gains in a representative capacity that gives rise to the obligations in s 254(1)(a), (b) and (c). The retention obligation in s 254(1)(d) is collocated with these obligations. That collocation suggests that all these obligations arise when the agent or trustee engages in derivation of income, profits or gains in a representative capacity. And the payment obligation in s 254(1)(e), which refers to "the income, profits or gains", refers to income, profits or gains in respect of which the agent or trustee must provide returns and be assessed.

89 In contrast, s 255(1) does not postulate that the controller has derived income, profits or gains on behalf of the non-resident taxpayer. The controller is not liable to be assessed to tax on the income, profits or gains derived by the non-resident taxpayer; and the controller is not obliged to make returns so as to facilitate the assessment of the tax liability in respect of that income or those profits or gains, or to be assessed in that regard. Section 255(1)(b) is not

collocated with provisions which operate at the point when the derivation of income, profits or gains by the non-resident taxpayer occurs.

90 Section 255(1) proceeds on the footing that the controller may have had nothing at all to do with the derivation of taxable income, profits or gains by the non-resident taxpayer so that the controller may have no knowledge at all of the tax affairs of the non-resident taxpayer. Most importantly, under s 255(1)(a), the controller's personal obligation to pay the tax payable by the non-resident taxpayer arises only when that tax is due by the non-resident taxpayer after an assessment issued by the Commissioner, and upon a "requirement" by the Commissioner in that regard. This aspect of the operation of s 255(1) was particularly material to the decision in *Bluebottle* because the retention obligation in s 255(1)(b) was held to be synchronised so as to arise with the payment obligation.

Bluebottle

91 In *Bluebottle*, it was held that the retention obligation imposed by s 255(1)(b) arises only once an assessment has been issued to the non-resident taxpayer. Because the amount of the tax payable by the non-resident taxpayer, which is the amount to be retained by the controller, can be established only by an assessment of the non-resident taxpayer, it was held that the intersection of the payment and retention obligations under s 255 occurs at the point of assessment. The Court explained its construction of s 255(1)(b)[104]:

> "This construction of s 255(1)(b) gives proper weight to the language used in that paragraph (the tax which is or will become due by the non-resident) when compared with the different expression used in para (a) (the tax due and payable by the non-resident). As Gibbs CJ observed in *Clyne v Deputy Commissioner of Taxation*, '[t]he word "due" is ambiguous; it can mean owing, although not payable until some future date, or it can mean presently payable'. And as the decision in *Clyne* illustrates, it is necessary to consider expressions like 'due', and 'due and payable', when used in the [Assessment Act], in the context of the Act as a whole. When 'due' is used in the collocation found in s 255(1)(b), 'the tax which is or will become due by the non-resident', the requirement for specifying the amount of money that meets that description requires that the word 'due' is read as meaning assessed as owing." (footnote omitted)

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104 (2007) 232 CLR 598 at 628 [81].

92 In the upshot, the Court concluded[105] that:

> "Once it is recognised that content can be given to the obligation imposed by s 255(1)(b) only if an assessment has issued, the operation of the provision, as a whole, can be seen to be that described [earlier]."

93 It will be necessary to say something more about the reasoning in *Bluebottle* in due course; but for present purposes it is enough to note that the phrase "sufficient to pay the tax which is or will become due" was construed to mean "sufficient to pay the tax which has been assessed and is due for payment or the tax which, although assessed, is not yet due for payment". It will be seen that this construction was held to be necessary, otherwise there would be no basis for quantifying the controller's payment and retention obligations[106].

94 It may be noted that the construction given to s 255(1)(b) in *Bluebottle* meant ascribing a different meaning to the word "due" used in the present tense "is … due" from that applicable when "due" is used in the future tense "will become due". Ordinarily, one would be slow to attribute different meanings to the same word used in one phrase; but this attribution of varying meanings to "due" was necessary in order to give the whole phrase a coherent operation given contextual constraints upon its meaning.

95 It is also convenient to note here that in *Bluebottle* the Court contrasted the context in which s 255(1)(b) appears with s 52 of the 1915 Act (the predecessor to s 254)[107], describing the contextual differences as "radical"[108]. It may be said, respectfully, that to describe the differences as radical is to suggest the possibility that the provisions have a different operation; but that possibility did not engage the consideration of the courts below.

The reasons of the primary judge

96 The primary judge concluded[109] that s 254 should be construed in the same manner as s 255 was construed in *Bluebottle*, holding that, "[b]y analogy with

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105 (2007) 232 CLR 598 at 633 [97].

106 (2007) 232 CLR 598 at 627 [78]-[80].

107 (2007) 232 CLR 598 at 629-632 [84]-[91].

108 (2007) 232 CLR 598 at 629 [84].

109 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 622-623 [21]-[22].

Bluebottle, content can be given to the obligation imposed by s 254(1)(d) only if an assessment has issued."[110]

97 The primary judge characterised s 254 as "but a collection provision"[111] on the basis that the liability to tax of the agent or trustee arises from the operation of other provisions of the Assessment Act and the 1997 Act. As noted above, that characterisation does not accommodate the express provisions of s 254 of the Assessment Act.

The reasons of the Full Court

98 In the Full Court, Edmonds J, with whom Collier J agreed, upheld the primary judge's conclusion, but approached the resolution of the issue in a somewhat different manner. The primary judge had framed the issue as being whether the liquidators were liable to tax "prior to the issuing of a notice of assessment to ABS"[112]. Edmonds J observed[113] that it "seemed to be common ground" that an assessment of tax in respect of the sale of the Crestmead property would eventually be issued to ABS and not to the liquidators. On that basis, his Honour held that[114]:

> "no tax liability arose on the entry into of the contract of sale of the Crestmead property, either for ABS or, more relevantly, the liquidators. At most, ABS made a capital gain which entered into computation of its net capital gain for the year ... The most that could be said is that on 30 June 2012, ABS had an obligation to pay income tax in the future."

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110 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 623 [22]. His Honour drew support for his construction of s 254(1)(d) from dicta of Fraser JA in the Queensland Court of Appeal in *Deputy Commissioner of Taxation v Barkworth Olives Management Ltd* [2011] 1 Qd R 326 at 340 [29] that the phrase "tax which is or will become due" is "an expression that postulates a degree of certainty about the fact and amount of the tax liability which might not be present before a notice of assessment is served."

111 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 624 [29].

112 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 616 [2].

113 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 264 [2].

114 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 270-271 [19]-[20].

99 In the view of Edmonds J, regardless of whether or not an assessment must be issued to the liquidators, the liquidators themselves would have no tax liability. This approach rendered redundant the Commissioner's arguments about the proper construction of the phrase "is or will become due" in s 254(1)(d).

100 As to whether s 254 is merely a collecting section that has no operation to create a liability where a liability is not otherwise imposed, Edmonds J, like the primary judge, confined the potential source of any liability in the liquidators of ABS to other provisions, namely those in Div 6 of Pt III of the Assessment Act[115], which relate to trust income. Edmonds J held that[116]:

> "The words, 'will become due', in the sense of 'owing', predicate nothing less than certainty, and that, in my view, cannot be predicted prior to the issue of a relevant assessment; but if it can be predicted on the facts of a particular case ... it cannot be predicated [sic] on the facts of this case where it was common ground that the assessment, when it did issue, would issue to ABS."

101 Davies J, in a separate judgment, did not agree with Edmonds J that "it is a complete answer to the Commissioner's case that it was, apparently, common ground that any assessment would issue to the company."[117] Her Honour held that s 254 contemplates that an agent or trustee may be assessed as liable to tax albeit in a representative capacity[118]. Davies J held[119] that:

> "the reasoning in [*Bluebottle*] in respect of the proper construction of s 255 … applies equally to the proper construction of s 254, and … s 254(1)(d) is to be read as referring to an amount of tax that has been assessed."

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115 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 272 [25].

116 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 273 [29].

117 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 264 [2].

118 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 274 [34].

119 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 274 [35].

The Commissioner's submissions

102 The Commissioner made three broad submissions to this Court. The first concerned what the Commissioner identified as the "central proposition" underpinning the judgment of Edmonds J, namely, that s 254 had no operation in this case because the capital gain would be assessed to ABS and not to the liquidators, on the basis that no liability falls upon the liquidators under Div 6 of Pt III of the Assessment Act. The Commissioner submitted that, following this Court's decision in *Federal Commissioner of Taxation v Bamford*[120], a liquidator, although a "trustee" under s 6(1) of the Assessment Act, "is not a trustee of a trust estate in any ordinary sense". Thus, the liquidators are not in charge of a "trust estate" for the purposes of Div 6 of Pt III of the Assessment Act[121]. The Commissioner submitted that in light of *Bamford*, the essential premise of Edmonds J's judgment was misconceived. The respondents did not seek to contest this submission. In truth, there was, and could be, no trust estate as between the liquidators and ABS. The Commissioner's first submission should be accepted.

103 Secondly, the Commissioner submitted that Edmonds J erred in construing s 254 on the basis that it was merely a collecting provision and that the liquidators' liability for tax, if any, must be found elsewhere in the Assessment Act. The Commissioner noted that, pursuant to s 102-5 of the 1997 Act, the capital gain arising from the disposal of the Crestmead property was included in ABS' assessable income. This circumstance formed the basis of Edmonds J's understanding that it was common ground that liability would fall to ABS and not to the liquidators. The Commissioner argued that the circumstance that ABS was principally liable to pay tax upon its capital gain does not defeat the operation of s 254 in relation to the liquidators. That is because, while s 254 assumes an anterior liability of a principal or beneficiary for tax on a capital gain, it nonetheless imposes a liability on the agent or trustee.

104 Once again, the respondents did not contest the submission of the Commissioner. It should be accepted. Section 254(1) is both a collecting provision and a liability-imposing provision in that, as an aid to the collection of tax, it imposes a personal liability to tax on the agent or trustee. Section 254(1)(a) expressly provides that an agent or trustee "shall be answerable as taxpayer … for the payment of tax" on income, profits or gains derived by him or her in his or her representative capacity. This language creates a personal

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120 (2010) 240 CLR 481 at 503 [28]; [2010] HCA 10.

121 *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 503 [27]-[28].

liability in an agent or trustee to pay tax albeit that this liability is ancillary to that of the principal or beneficiary[122].

105 One comes then to the Commissioner's third submission. The appeals to this Court turn upon the issue raised by this submission. The Commissioner argued that the word "due", used in s 254(1)(d) in both the present and future tense, is to be construed as meaning "owing as assessed" in both of its temporal operations. The use of both present and future tense in s 254(1)(d) – "is … due" and "will become due" – encompasses tax which is presently owing under an assessment or will become owing under an assessment.

106 The Commissioner argued that, by reason of differences of text and context between ss 254 and 255, *Bluebottle* does not resolve the present case in favour of the respondents. Indeed, it was said that *Bluebottle* provides some reason to construe s 254(1)(d) as imposing an obligation upon an agent or trustee before an assessment is issued by the Commissioner. That is because the retention obligation may arise in relation to tax that will in the future be assessed as owing.

107 The Commissioner noted that, in contrast to the class of persons at whom s 255 is directed, that is, "every person having the receipt control or disposal of money belonging to a non-resident", s 254 is addressed to a class of persons directly connected with the derivation of the relevant income, profits or gains on behalf of a principal or beneficiary.

108 The Commissioner also argued that an agent or trustee's liability to pay tax arises automatically upon the derivation of income, profits or gains. As will be seen, that argument was not necessary to make good the Commissioner's submission as to the proper construction of s 254(1)(d). A present obligation to retain money to meet a future assessment to tax may arise independently of a present liability to pay tax. Whether it does arise as a matter of the proper construction of s 254(1)(d) depends, in part at least, upon whether, as under s 255(1), the quantification of the retention obligation is dependent upon the existence of the assessment which quantifies the payment obligation. As will be seen, under s 254(1) the retention obligation may arise in anticipation of an assessment.

The respondents' submissions

109 The main thrust of the respondents' argument was that the decision in *Bluebottle* dictates the outcome in this case. It was said that, as in *Bluebottle*, the phrase "is or will become due" in s 254(1)(d) requires the certainty of an assessment before the retention obligation can arise. The agent or trustee is

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122 *Webb v Syme* (1910) 10 CLR 482 at 491.

neither authorised nor required to retain any more than the precise sum which is owing as tax. Without an assessment, it is not possible to know what sum of money "will" (as opposed to "may") need to be paid in respect of the tax for which the agent or trustee may be liable. It was said that an agent or trustee's familiarity with the affairs of the principal or beneficiary does not cure that uncertainty. Further, if a retention obligation were to arise whenever the agent or trustee derived gains, an undue burden would be imposed on many agents and trustees.

110 It was also said that, because the agent or trustee is answerable as a taxpayer, and taxpayers are usually assessed annually, it is impractical to construe the phrase in s 254(1)(d) "in respect of the income, profits or gains" as referring to individual transactions as distinct from a total annual amount of income, profits or gains.

The reasoning in *Bluebottle*

111 In order to resolve the contest between the submissions of the parties, it is necessary now to consider more closely the reasoning in *Bluebottle*.

112 In *Bluebottle*, it was held that the phrase "the tax which … will become due" in s 255(1)(b) referred not to tax which will be assessed as owing, as it ordinarily would, but to the tax described in s 255(1)(a), that is, the tax which will become payable by the non-resident taxpayer in accordance with a current assessment issued to them. The first step in reasoning to this conclusion was to observe that the reference in s 255(1)(b) to "the tax which is or will become due" is to a quantified amount of tax. The Court said[123]:

> "When s 255(1)(b) refers to 'the tax which is or will become due by the non-resident' it must be read as referring to an ascertained sum. If the paragraph is not read in that way, the obligation to retain money which is imposed on the controller is an obligation of undefined content. It is undefined because all that may be retained (the controller 'is hereby authorised … to retain') 'out of any money which comes to him on behalf of the non-resident' is *sufficient* to pay the tax which is or will become due. And it is *that* amount (and only that amount) which the controller is obliged to retain. And as the facts of the present matter show, if s 255(1)(b) is not read as referring to an ascertained sum, the Commissioner may require the controller to retain more than the amount later assessed as due from the non-resident. But that would require the controller, as the Commissioner's first notices did in this case, to retain

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123 (2007) 232 CLR 598 at 627 [78].

> more than sufficient to pay the tax which is or will become due." (emphasis in original)

113 The next step in the Court's reasoning was to observe that the quantification of the obligation in s 255(1)(b) to retain money was aligned with the quantification of the obligation in s 255(1)(a) to pay tax when required by the Commissioner. The Court said[124]:

> "Until the tax payable by the non-resident has been assessed it is not possible to say more than that there *may* be tax due by the non-resident. It is not possible to say that tax *is* due or that tax *will become* due. The prediction that tax *may* be due (and any prediction of its likely amount) may be able to be made with more or less certainty by a person who is armed with a deal of information, but there is no reason to suppose that the controller of a non-resident's money would ordinarily, let alone invariably, have that information and be in a position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives. …
>
> Paragraph (b) of s 255(1) should be read as referring to an amount of tax that has been assessed. The phrase 'tax which … will become due' is to be understood as referring to tax which, although assessed, is not yet due for payment." (emphasis in original)

114 The controller's retention obligation was said to "intersect" with its payment obligation. In this regard, the Court said[125]:

> "[T]he obligations to retain and to pay are seen as intersecting obligations. The point of their intersection is the specification of the tax which under para (a) is to be paid when required by the Commissioner, and which under para (b) is both the amount that may be retained (the controller 'is hereby authorised') and the amount that must be retained (the controller 'is hereby ... required')."

115 It is important to note that, in contrast to s 255(1)(b), s 254(1)(d) gives rise to an obligation to pay *any* tax in respect of income, profits or gains, rather than the tax which has been assessed. Whereas in s 255(1)(a) the quantification of the payment obligation is effected by an existing assessment, in s 254(1)(a) the payment obligation is quantified by reference to the tax payable in respect of the income, profits or gains which have been derived and in relation to which the agent or trustee is obliged by s 254(1)(b) and (c) to provide returns and be

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124 (2007) 232 CLR 598 at 627 [79]-[80].

125 (2007) 232 CLR 598 at 628 [82].

assessed. As noted above, an agent or trustee who has derived income, profits or gains, which are, generally speaking, subject to the Assessment Act, is obliged to prepare returns and be assessed thereon. Section 254(1)(b), in creating an obligation to "make ... returns and be assessed thereon" in respect of income, profits or gains derived by the agent or trustee, expressly postulates the absence of a current assessment, and anticipates the making of an assessment in the future. This postulate immediately distinguishes *Bluebottle* from the present case.

The ordinary meaning of "due"

116 The upshot of the reasoning in *Bluebottle*[126] was that the construction of the phrase "the tax which … will become due" in s 255(1)(b) is constrained by the context in which it is used so that it does not bear its ordinary meaning within the Assessment Act. In this case, considerations of text, context and purpose in relation to s 254(1)(d) do not point towards the construction which the Court in *Bluebottle* gave to the crucial phrase in s 255(1)(b).

117 As to the ordinary meaning of "due" in the Assessment Act, in *Clyne v Deputy Commissioner of Taxation*[127] Gibbs CJ said of the expression "due and payable" used in some of the provisions of the Assessment Act that:

> "although the expression appears on any view to be tautological, the change of words appears to be intended to indicate a change of meaning, so that 'due' in that phrase must mean 'owing'."

118 His Honour went on to conclude[128] that:

> "[w]hen the word 'due' is used in the Act, without the accompanying words 'and payable', it will prima facie mean simply owing. This distinction between 'due' and 'payable' is clearly drawn in s 255(1), which requires a person in receipt or control of money belonging to a non-resident to 'pay the tax due and payable by the non-resident' (par (a)) and 'to retain ... so much as is sufficient to pay the tax which is or will become due by the non-resident' (par (b)) (see also s 254(d))."

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126 (2007) 232 CLR 598 at 629-632 [84]-[91].

127 (1981) 150 CLR 1 at 8.

128 (1981) 150 CLR 1 at 9-10.

119 In *Clyne*, Mason J, with whom Aickin and Wilson JJ agreed, and with whom Brennan J agreed on this point[129], accepted[130] that Isaacs J was right in *Mack v Commissioner of Stamp Duties (NSW)*[131] when he said of the words "debts due":

> "'[P]rima facie' and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not."

120 Mason J noted[132] the:

> "presumption that in a statute the same word is always used with the same meaning … However, it is now settled that presumption readily yields to the context and, as Gibbs J noted in *McGraw-Hinds (Aust) Pty Ltd v Smith*[133]: 'It is well recognized that a word may be used in two different senses in the same section of the one Act'."

121 In relation to income tax legislation in particular, Mason J went on to say[134]:

> "There are statements to the effect that the presumption has little force in Income Tax Acts – see *Martin v Lowry*[135]; *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners*[136]."

122 Mason J, like Gibbs CJ, noted[137] that the expression "due and payable" is used in other sections of Pt VI of the Assessment Act, which "in itself suggests

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129 (1981) 150 CLR 1 at 24.

130 (1981) 150 CLR 1 at 15.

131 (1920) 28 CLR 373 at 382; [1920] HCA 76.

132 (1981) 150 CLR 1 at 15.

133 (1979) 144 CLR 633 at 643; [1979] HCA 19.

134 (1981) 150 CLR 1 at 15.

135 [1926] 1 KB 550 at 561.

136 [1963] AC 135 at 150.

137 (1981) 150 CLR 1 at 16.

that the word 'due' when used in isolation bears its prima facie meaning unless there is a constraining context."

123 Mason J concluded[138] that the correct view is that:

> "income tax is due when it is assessed and notice is served of that assessment and … the tax does not become payable before the date fixed".

124 On the footing then that tax is ordinarily "due" within the meaning of the Assessment Act when it is assessed, s 254(1)(d) by its use of both the present tense ("which is … due") and future tense ("which … will become due") imposes an obligation on the agent or trustee "to retain … so much as is sufficient to pay tax which is owing as assessed or which will become owing as assessed." The ordinary meaning of s 254(1)(d) is that an agent or trustee is prima facie obliged to retain money sufficient to pay tax which has been or will be assessed as owing. The question then is whether textual or contextual considerations, or considerations of statutory purpose, point away from that construction.

Textual and contextual considerations

125 As to considerations of text, it is significant that, as noted above, s 254(1)(d) requires the retention of so much of any money which comes to the agent or trustee in his or her representative capacity as is sufficient "to pay *tax* which is or will become due in respect of the … gains." This may be contrasted with s 255(1)(b), which imposes a retention obligation which is measured by the amount of "*the* tax which is or will become due by the non-resident". The use of the definite article in s 255(1)(b) to identify the tax payable provided the basis for the reasoning in *Bluebottle*[139] that s 255(1)(b) resolved the uncertainty which would otherwise exist as to the amount to be retained by the controller, by aligning the controller's retention obligation with the assessment which quantifies the tax payable by the non-resident taxpayer (and, consequently, payable by the controller).

126 Section 254 proceeds on the quite different footing that the agent or trustee is obliged to make a return of the income, profits or gains derived by him or her and be assessed thereon and pay that sum. These returns will reflect his or her liability to tax when it is assessed[140]. The quantification of the amount of income, profits or gains and of the tax to be paid thereon (and to be retained) is the responsibility of the agent or trustee, who, as agent or trustee, is "answerable

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138 (1981) 150 CLR 1 at 16.

139 (2007) 232 CLR 598 at 627 [78]-[80].

140 Assessment Act, s 166.

as taxpayer" and is obliged to provide returns and be assessed to tax on the income, profits or gains derived by him or her. These responsibilities in relation to the quantification of the income, profits or gains derived by the agent or trustee (which as already noted are substantially different from those borne by the controller in s 255) arise upon and by reason of the derivation of income, profits or gains by the agent or trustee. And they arise in anticipation of an assessment to tax *in the future*.

127 The respondents' arguments based on the uncertainty of the payment and retention obligations under s 254(1) do not have the force here that they had in *Bluebottle* in relation to s 255(1). While s 255(1)(b) imposes a retention obligation the extent of which can be measured only by reference to the assessment issued to the non-resident taxpayer when it is issued, s 254(1)(d) imposes a retention obligation the quantification of which is squarely the responsibility of the agent or trustee.

128 The obligation in s 254(1)(b) to provide returns in respect of, and to be assessed on, the income, profits or gains "derived by him or her in his or her representative capacity, or derived by the principal by virtue of his or her agency", proceeds on the assumption that the agent or trustee has available such information from the principal or beneficiary as may be required to complete that task. As a practical matter, this assumption is likely to be sound. Unlike the controller addressed by s 255(1)(b), the agent or trustee is to be assessed to tax in his or her own right, albeit in a representative capacity, and so will be cognisant of the income, profits or gains "derived by him or her in his or her representative capacity".

129 And so far as the agent or trustee is obliged to prepare returns and be assessed upon income, profits or gains "derived by the principal by virtue of his or her agency", the agent or trustee can be expected, as a matter of ordinary commercial prudence, to make arrangements with the principal or beneficiary to ensure that the principal or beneficiary will make all necessary information available. The agent or trustee is, after all, engaged in earning income, profits or gains for the principal or beneficiary, and can be expected to be astute to ensure that his or her position in relation to his or her obligations is protected.

Considerations of purpose

130 Section 254 is addressed to a risk to the revenue posed by a class of persons identified by two essential characteristics: first, they are persons actively involved in deriving income, profits or gains on behalf of a principal or beneficiary; and secondly, they are persons whose relationship with the principal or beneficiary is such that they may be obliged to pay away to it the income, profits or gains derived on its behalf. The risk to the revenue which arises by reason of these two characteristics of the class of persons addressed by s 254 has two aspects. First, the income, profits or gains derived for the benefit of the

principal or beneficiary may be paid away to it by the agent or trustee and the principal or beneficiary may not, for whatever reason, pay the tax it should have paid. Secondly, the agent or trustee may, because he or she has paid over funds to his or her principal or beneficiary, no longer have the means to meet his or her liability for the payment of tax on the income, profits or gains derived by him or her in his or her representative capacity.

131 Without s 254(1)(d), the Commissioner would be at risk of being left with a claim against an agent or trustee who has paid away the funds from which his or her own liability to tax might be met, in circumstances where both the agent or trustee and the principal or beneficiary are not worth powder and shot. The object of s 254(1)(d) is to obviate both aspects of that risk. That risk arises at the moment that income, profits or gains are derived by the agent or trustee and moneys come into his or her hands which are payable to the principal or beneficiary. In contrast, the risk to the revenue addressed by s 255(1) arises only when the non-resident taxpayer has been assessed.

132 The retention obligation serves to ensure that there is sufficient money in the hands of the agent or trustee to pay his or her liability for the tax which is assessed as owing or which will be assessed as owing should the principal or beneficiary, for any reason, not meet that liability when it is assessed. The achievement of this purpose is best aided by giving s 254(1)(d) its ordinary meaning within the Assessment Act. If it is accorded that meaning, the purpose of the provision will not be defeated by the agent or trustee paying away the moneys that come into his or her hands when income, profits or gains have been derived (and are required to be included in returns) before an assessment is issued.

133 It may be said that the burden so imposed on an agent or trustee is a heavy one; but it is also the case that the occasion for the imposition of this burden is incidental to engaging in the activity of deriving income, profits or gains for a principal or beneficiary to whom the agent or trustee is obliged to pay away the funds so derived.

Conclusion and orders

134 There is no good reason to construe s 254(1)(d) otherwise than on the basis that the phrase "tax which … will become due" means "tax which … will be assessed".

135 Each appeal should be allowed.

136 The orders of the Full Court of the Federal Court of Australia made on 8 October 2014 should be set aside and, in their place, it should be ordered that the appeals to that Court be allowed and the orders of the primary judge of 21 February 2014 be set aside.

137 The matters should be remitted to the primary judge for the determination of the issue identified at [13(a)] of the reasons of the primary judge.

138 The Commissioner having made a decision to provide funding under the ATO Test Case Litigation Program, the Commissioner must pay the respondents' costs of the appeals as agreed or as assessed on a party and party basis.

GORDON J.

Introduction

139 On 2 March 2011, Australian Building Systems Pty Ltd ("ABS") was placed into voluntary administration under Pt 5.3A of the *Corporations Act* 2001 (Cth) ("the Corporations Act"). On 6 April 2011, ABS's creditors resolved that it be wound up under s 439C of the Corporations Act. ABS's administrators, Ms Muller and Ms Dunn, were appointed liquidators of ABS ("the Liquidators").

140 At the time that ABS entered administration, ABS owned real property at 118-128 Magnesium Drive, Crestmead, Queensland ("the Crestmead Property"). On 21 July 2011, the Liquidators caused ABS to enter into a contract of sale for the Crestmead Property. That disposal caused CGT event A1 to happen under s 104-10 of the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act"). The proceeds from the disposal of the Crestmead Property were $4 million. ABS's cost base for the Crestmead Property was around $2.88 million. This gave rise to a capital gain for ABS under s 104-10(4) of the 1997 Act of about $1.12 million.

141 A dispute emerged between the Liquidators and the Commissioner of Taxation ("the Commissioner") as to whether the Liquidators were obliged by s 254 of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"), prior to an assessment being raised against ABS, to retain money to meet any tax liability in relation to the CGT event.

142 Section 254(1) of the 1936 Act relevantly provides:

> "With respect to every agent and with respect also to every trustee, the following provisions shall apply:
>
> (a) He or she *shall be answerable as taxpayer* for the doing of all such things as are required to be done by virtue of this Act in respect of the income, or any profits or gains of a capital nature, *derived by him or her in his or her representative capacity*, or derived by the principal by virtue of his or her agency, *and for the payment of tax thereon*.
>
> (b) He or she shall in respect of that income, or those profits or gains, make the returns and be assessed thereon, but in his or her representative capacity only, and each return and assessment shall, except as otherwise provided by this Act, be separate and distinct from any other.
>
> (c) If he or she is a trustee of the estate of a deceased person, the returns shall be the same as far as practicable as the deceased person, if living, would have been liable to make.

(d) He or she is hereby *authorized and required 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*.

(e) He or she is hereby made personally liable for the tax payable in respect of the income, profits or gains to the extent of any amount that he or she has retained, or should have retained, under paragraph (d); but he or she shall not be otherwise personally liable for the tax.

(f) He or she is hereby indemnified for all payments which he or she makes in pursuance of this Act or of any requirement of the Commissioner.

(g) Where as one of 2 or more joint agents or trustees he or she pays any amount for which they are jointly liable, each other one is liable to pay him or her an equal share of the amount so paid.

(h) For the *purpose of insuring the payment of tax* the Commissioner shall have the same remedies against attachable property of any kind vested in or under the control or management or in the possession of any agent or trustee, as the Commissioner would have against the property of any other taxpayer in respect of tax." (emphasis added)

143 "[T]rustee" is defined in s 6(1) of the 1936 Act to include a liquidator. "[L]iquidator" is defined in s 6(1) of the 1936 Act to mean "the person who, whether or not appointed as liquidator, is the person required by law to carry out the winding-up of a company". "Agent" is not relevantly defined in the 1936 Act or the 1997 Act[141].

144 The Liquidators sought a private ruling from the Commissioner. The application specified the client as "[ABS] (in liquidation)". The questions posed and the answers given in the ruling were:

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141 See s 6(1) of the 1936 Act and ss 960-105 and 995-1(1) of the 1997 Act. Section 960-105(2) of the 1997 Act provides that "[t]his Act, or a provision of this Act, applies to an entity as if the entity were an agent of another entity if the Commissioner determines in writing that the entity is the agent or sole agent of the other entity for the purposes of this Act or of that provision". In s 995-1(1) of the 1997 Act, "this Act" is defined to include the 1936 Act and parts of the *Taxation Administration Act* 1953 (Cth).

"**Question 1**

Is the liquidator required under section 254 of the [1936 Act] to account to the Commissioner out of the proceeds of sale, any capital gains tax liability that crystallises on the sale of an asset that belonged to [ABS] before liquidation?

Answer

Yes

Question 2

If the answer to question 1 is yes, are the monies to be retained once an assessment issues?

Answer

No

Question 3

If the answer to question 2 is no, are the monies to be retained at crystallisation of any capital gains?

Answer

Yes".

145 ABS lodged an objection[142] to the private ruling. That objection was disallowed by the Commissioner. ABS filed an appeal against that objection decision in the Federal Court of Australia. The Liquidators also filed an application seeking declaratory relief against the Commissioner in respect of their obligations under s 254 of the 1936 Act. The proceedings were heard together and were the subject of appeal to the Full Court of the Federal Court.

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142 See s 359-60(1) of Sched 1 to the *Taxation Administration Act* 1953 (Cth).

146 The primary judge[143] and the Full Court[144] held that s 254(1)(d) of the 1936 Act only imposes an obligation to retain once an assessment has issued[145].

Issues and preliminary observations

Issues

147 Three issues were raised on appeal to this Court. First, is s 254 of the 1936 Act in its application to trustees limited to where the trustee is assessable for the income, profits or gains in relation to a trust estate under Div 6 of Pt III of the 1936 Act? Second, does s 254 of the 1936 Act only operate where the agent or trustee is otherwise assessable under some other provision of the revenue law, or does s 254 create by its own force an ancillary liability in the agent or trustee (and associated obligation and authorization of the agent or trustee) for the more convenient collection of tax for which the principal or beneficiary is principally liable? Third, does s 254(1)(d) of the 1936 Act authorize and oblige the Liquidators, as trustees, to retain an amount sufficient to pay the tax to be assessed in respect of the sale of the Crestmead Property *prior* to the issue of an assessment or does the obligation to retain only arise after the issue of an assessment?

148 The first two questions were raised for the first time by members of the Full Court on the hearing of the appeals before that Court. Neither party made any submissions in the Full Court about those questions. Before this Court, the Commissioner submitted that the Full Court was wrong in the conclusions it expressed. ABS and the Liquidators made no submissions in this Court in relation to those issues and did not seek to maintain the reasoning of the Full Court. For the reasons that follow, I would reach a different conclusion to the Full Court in respect of each issue.

149 The third question is the principal question on appeal. As seen earlier[146], the primary judge and the Full Court held that s 254(1)(d) of the 1936 Act only imposes an obligation to retain once an assessment has issued.

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143 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 623 [25].

144 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 273 [29], 274 [35].

145 ABS and the Liquidators also filed in the appeals to this Court a Notice of Contention to raise this construction of s 254(1)(d) of the 1936 Act.

146 See footnotes 143 and 144 above.

150 Before this Court, the Commissioner submitted that the retention authorization and obligation in s 254(1)(d) arose on and from *derivation* of the income, profits or gains identified in s 254(1)(a). ABS and the Liquidators' position was that the retention authorization and obligation in s 254(1)(d) did not arise until an assessment had issued. For the reasons that follow, the retention authorization and obligation in s 254(1)(d) arises on and from derivation.

Preliminary observations

151 Before turning to the three issues, some preliminary matters should be noted. First, s 254 of the 1936 Act is not a new provision. It had a colonial antecedent – s 12 of the *Income Tax Act* 1895 (Vic)[147] ("the 1895 Act"). That section, in turn, can be seen to have been based on ss 41 and 44 of the *Income Tax Act* 1842 (5 & 6 Vict c 35)[148]. The colonial antecedent was used as a model for s 52 of the *Income Tax Assessment Act* 1915 (Cth) ("the 1915 Act"). In 1922, the *Income Tax Assessment Act* 1922 (Cth) ("the 1922 Act") was passed. The 1922 Act consolidated and amended the tax laws. Section 89 of that Act is the immediate predecessor to s 254 of the 1936 Act. There were some minor changes when s 254 was enacted in 1936.

152 Section 89 of the 1922 Act had relevantly provided:

> "With respect to every agent and with respect also to every trustee, the following provisions shall apply:—
>
> …
>
> (d) where as agent or trustee he pays income tax, he is hereby authorized to recover the amount so paid from the person in whose behalf he paid it, or to deduct it from any money in his hands belonging to that person;
>
> (e) he is hereby authorized and required to retain from time to time out of any money which comes to him in his representative capacity so

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147 Similar provisions were found in the revenue statutes of other colonies: see, eg, ss 19 and 20 of the *Land and Income Tax Assessment Act* 1895 (NSW).

148 Section 41 made trustees (among others) answerable only for receipt of profits and gains for certain persons without capacity and any person not resident in Great Britain. In contrast, the colonial and federal successors made a trustee answerable in respect of any income, profits or gains derived in a representative capacity. See *Drummond v Collins* [1915] AC 1011 at 1019; *Williams v Singer* [1919] 2 KB 108 at 115, 122-123; *Whitney v Inland Revenue Commissioners* [1924] 2 KB 602 at 610-611. Similar provisions can be traced back to 1799 (39 Geo III c 13, s 91).

much as is sufficient to pay the income tax which is or will become due in respect of the income;

(f) he is hereby made personally liable for the income tax payable in respect of the income if, after the Commissioner has required him to make a return, or while the tax remains unpaid, he disposes of or parts with any fund or money which comes to him from or out of which income tax could legally be paid, but he shall not be otherwise personally liable for the tax".

153 Section 89(d) of the 1922 Act was not re-enacted in s 254. Section 89(e) of the 1922 Act became s 254(1)(d). The personal liability obligation in s 89(f) became s 254(1)(e) but was amended with the effect that the personal liability of the agent or trustee was not restricted to moneys paid away after the Commissioner required the agent or trustee to make a return. The personal liability obligation was also amended to link the personal liability to the retention obligation in sub-s (1)(d). Section 254 has remained relevantly unchanged since 1936. As will become evident, this history is not unimportant.

154 Second, much of the debate in this Court focused on sub-s (1)(d) of s 254 and whether the retention authorization and obligation in that paragraph operated before or only after the issue of an assessment by the Commissioner. In resolving that and other debates about the construction of the provision, the text of the whole of s 254 is important[149]. Section 254 is comprised of a number of parts. It would be wrong to approach the construction of s 254 "piecemeal"[150]. It would be wrong to consider the retention authorization and obligation in s 254(1)(d) without understanding the scheme created by s 254 as a whole.

155 It is against that background that each issue will be considered.

Issue 1 – s 254 and Div 6 of Pt III of the 1936 Act

156 The majority of the Full Court concluded that no amount of tax had, or ever could, become "due" for payment by the Liquidators within the meaning of

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149 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47-48 [51]; [2009] HCA 41.

150 *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598 at 633 [96]; [2007] HCA 54.

s 254(1)(d) of the 1936 Act, whatever construction was accorded to the words "is or will become due" in s 254(1)(d)[151].

157 That conclusion was said to be founded on the fact that s 254 could not operate in relation to the "income, or any profits or gains of a capital nature" derived on the sale of the Crestmead Property because the capital gain would be assessed to ABS, and not the Liquidators, as a result of Div 6 of Pt III of the 1936 Act. The proposition was that ABS would be "presently entitled" to all the income (of the trust estate) under Div 6 of Pt III of the 1936 Act and, therefore, ABS would be assessed to tax and the Liquidators, as trustees, would not[152]. The premise underlying that conclusion, that the Liquidators were "trustees of a trust estate" to whom Div 6 of Pt III of the 1936 Act applied[153], is, with respect, misconceived.

158 Division 6 of Pt III of the 1936 Act sets out the basic income tax treatment of the net income of a trust estate[154]. The basic elements in relation to a resident trust estate are found in ss 96, 97, 98 and 99 of the 1936 Act. First, except as otherwise provided by the 1936 Act or the 1997 Act, "a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate"[155]. Second, a beneficiary of a trust estate presently entitled to a share of the income of the trust estate, and not under a legal disability, is assessable on that share of the net income of the trust estate[156]. However, where a beneficiary is presently entitled to a share of the income of the trust estate, but is under a legal disability, the trustee is to be assessed and liable to pay tax on that share of the net income of the trust estate[157]. Finally, where there is a share of the income of the trust estate

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151 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 272-273 [24]-[29].

152 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 264 [2], 271 [20]-[21], 272 [25], 273 [28]-[29].

153 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 272-273 [25]-[30].

154 s 95AAA of the 1936 Act.

155 s 96 of the 1936 Act, read with the definition of "this Act" in s 6(1) of the 1936 Act.

156 s 97 of the 1936 Act.

157 s 98 of the 1936 Act.

to which no beneficiary is presently entitled, the trustee is assessable on the net income of the trust estate equal to that share[158].

159 Two important principles underpin the operation of Div 6 of Pt III.

160 First, while the definition of "trustee" in s 6(1) of the 1936 Act goes beyond trusts of a settlement or testamentary trusts[159], the definition is stated to apply "unless the contrary intention appears". Not every person or entity which answers the statutory definition of "trustee" in s 6(1) will be a trustee for the purposes of Div 6 of Pt III[160].

161 As Rich and Dixon JJ stated in *Howey v Federal Commissioner of Taxation*[161], the references to "income of the trust estate" in s 31 of the 1922 Act (the predecessor to Div 6 of Pt III) suggested that the person who answers the description "trustee" in that context "must stand in some relation to the proprietary right [by] which the income arises, even although [that person] need not be a trustee in the proper sense".

162 A liquidator is identified in the definition of "trustee" in s 6(1) of the 1936 Act. But a liquidator is not a trustee of a trust estate in any ordinary sense[162]. A liquidator does not stand in some relation to the proprietary right by which the income of the company being wound up is generated. During the winding up of a company, the company continues to exist[163]. The liquidator takes over from the company's officers as the person to administer the company's property[164].

163 In a voluntary winding up, subject to the provisions of the Corporations Act as to preferential payments, the property of the company must be applied in

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158 ss 99(1)-(3) and 99A of the 1936 Act.

159 *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 503 [27]-[28]; [2010] HCA 10.

160 *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 503 [27]-[28].

161 (1930) 44 CLR 289 at 293; [1930] HCA 45.

162 *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 503 [28].

163 See s 493 of the Corporations Act in relation to a voluntary winding up.

164 The company can no longer act through its officers without the approval of the liquidator or the court: s 471A of the Corporations Act. See also s 499(4) of the Corporations Act in relation to a creditors' voluntary winding up.

satisfaction of its liabilities equally and, subject to that application, must, unless the company's constitution otherwise provides, be distributed among the members according to their rights and interests in the company[165]. To achieve this, the liquidator must take into their custody, or under their control, all of the property which is, or appears to be, the company's property[166]. But, in the absence of a vesting order made under a provision such as s 474(2) of the Corporations Act[167], the appointment of a liquidator to a company does not divest the company of its beneficial ownership in, or render the liquidator a trustee of, the company's assets[168]. And there was no vesting order made in the liquidation of ABS.

164 Second, the operation of Div 6 of Pt III of the 1936 Act depends upon the existence of a trust estate and the presence of net income of that trust estate[169]. In the present appeals, there was no trust estate and therefore no net income of any trust estate. Therefore, contrary to the view expressed by the majority of the Full Court, ABS was not, and could not be, a beneficiary of a trust estate presently entitled to the net income of that trust estate and thus assessable under Div 6 of Pt III. As between ABS and the Liquidators there was no "trust estate" to which Div 6 of Pt III could apply.

165 Section 254 of the 1936 Act, in its terms, applies to persons, such as liquidators, who fall within the definition of "trustee" in s 6(1) of the 1936 Act. Unlike the position with Div 6 of Pt III, there is nothing in s 254 to suggest that the word "trustee" when used in that section should not extend to persons who (in the ordinary case) are not "trustees of a trust estate" within the scope of Div 6 of Pt III.

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165 s 501 of the Corporations Act.

166 ss 474(1)(a) and 506(1)(b) of the Corporations Act. See *Federal Commissioner of Taxation v Bruton Holdings Pty Ltd (in liq)* (2008) 173 FCR 472 at 488 [42] (overturned in *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346; [2009] HCA 32, but not on this point).

167 Read with s 506(1)(b) of the Corporations Act.

168 *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 611-614 [50]-[58]; [2005] HCA 20; cf s 58 of the *Bankruptcy Act* 1966 (Cth).

169 See *Federal Commissioner of Taxation v Bamford* (2010) 240 CLR 481 at 502-503 [22]-[27].

166 The three authorities cited by the majority of the Full Court[170] do not support the adoption of a narrower construction of "trustee" in s 254. The first, *Howey*[171], has been addressed. The statements in that case by Rich and Dixon JJ were directed to where a "trustee" was being assessed under s 31 of the 1922 Act. While their Honours suggested that it was "perhaps doubtful" that s 89 imposed a liability on a trustee beyond s 31 of the 1922 Act, their Honours specifically contemplated that "[i]f the appellant's case falls outside s 31", then s 89 of the 1922 Act might apply[172].

167 The other two authorities cited by the majority of the Full Court in support of a narrower construction of "trustee" (*Union-Fidelity Trustee Co of Australia Ltd v Federal Commissioner of Taxation*[173] and *Federal Commissioner of Taxation v Prestige Motors Pty Ltd*[174]) each concerned a situation where there was income of a trust estate. They do not assist in resolving the proper construction of "trustee" in the context of s 254.

168 The question of the application of the definition of "trustee" to a liquidator was considered by this Court in *Joshua Bros Pty Ltd v Federal Commissioner of Taxation*[175] in the context of s 52 of the 1915 Act (a predecessor to s 254 of the 1936 Act). In that case, the question was whether income from the sale of trading stock by a company in liquidation was assessable under the 1915 Act. The Court held that it was. Three members of the Court addressed s 52. Knox CJ[176] observed that a liquidator was included in the designation of "trustee" in the 1915 Act[177] and was answerable by s 52 for the payment of income tax on income derived by them in their representative capacity. Isaacs J[178] referred to s 52 and said that "[t]he intention of the [1915] Act was indubitably to reach

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170 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 272-273 [24], [26]-[27].

171 (1930) 44 CLR 289.

172 *Howey* (1930) 44 CLR 289 at 294-295.

173 (1969) 119 CLR 177 at 181; [1969] HCA 36.

174 (1994) 181 CLR 1 at 11; [1994] HCA 39.

175 (1923) 31 CLR 490; [1923] HCA 3.

176 *Joshua Bros* (1923) 31 CLR 490 at 495.

177 s 3 of the 1915 Act.

178 *Joshua Bros* (1923) 31 CLR 490 at 496.

income of a company 'derived' during the regime of a liquidator". Rich J[179] observed that s 52, when read with two other sections in the 1915 Act, "was intended to and does cover the case of income made by the liquidator for the company". There is no cause to doubt those observations.

169 For these reasons, the conclusion of the majority of the Full Court that s 254 of the 1936 Act *only* operates in relation to "trustees" where those trustees are assessable upon the income, profits or gains to which the section applies under Div 6 of Pt III of the 1936 Act should be rejected.

Issue 2 – s 254 of the 1936 Act imposes ancillary liability and is a collecting provision

170 The second issue concerns the statutory scheme created by s 254 of the 1936 Act. The majority of the Full Court concluded that s 254 is a "collecting section" which only operates where the agent or trustee is otherwise assessable[180]. In other words, the majority concluded that s 254 imposes no separate liability on an agent or trustee which has not been imposed on that agent or trustee by some other provision of the revenue law. That construction of s 254 should be rejected. In understanding the statutory scheme, it is necessary to address key aspects of s 254.

171 Section 254(1) does two things. It creates a liability in the agent or the trustee which is ancillary to the primary liability of the principal or beneficiary[181]. It is also a machinery provision[182] which provides a means of collection against the agent or trustee in certain circumstances.

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179 *Joshua Bros* (1923) 31 CLR 490 at 501.

180 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 272 [25], 273 [28].

181 This view has prevailed in relation to the predecessors of s 254. For example, in relation to s 41 of the *Income Tax Act* 1842 (5 & 6 Vict c 35), see *Brooke v Inland Revenue Commissioners* [1917] 1 KB 61 at 69-70; *Whitney v Inland Revenue Commissioners* [1924] 2 KB 602 at 610-612.

182 This view has prevailed in relation to the predecessors of s 254. For example, in relation to ss 41 and 44 of the *Income Tax Act* 1842 (5 & 6 Vict c 35), see *Drummond v Collins* [1915] AC 1011 at 1018; *Williams v Singer* [1919] 2 KB 108 at 115, 122, 123; *Whitney v Inland Revenue Commissioners* [1924] 2 KB 602 at 610-611; in relation to s 12 of the 1895 Act, see *In the Matter of the "Income Tax Acts 1895 and 1896"* (1897) 22 VLR 539 at 540; *Webb v Syme* (1910) 10 CLR 482 at 497, 507; [1910] HCA 32; and in relation to s 89 of the 1922 Act, see *Howey* (1930) 44 CLR 289 at 294.

172 Section 254(1)(a) in its terms creates a liability in the agent or trustee in respect of the income or any profits or gains of a capital nature (derived by them in their representative capacity, or derived by the principal by virtue of their agency) by making the agent or trustee "answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of the income, or any profits or gains of a capital nature", including "for the payment of tax thereon".

173 It will be necessary to say more about this paragraph later in these reasons. For present purposes, it is sufficient to note that, first, the liability it imposes on an agent or trustee is "as taxpayer", and second, the liability is in respect of the income or any profits or gains of a capital nature derived by them in their representative capacity or by virtue of their agency, and includes a liability for the payment of tax on that income or those profits or gains.

174 Section 254(1)(b) then provides that the agent or trustee shall, in respect of that income or those profits or gains, make the returns and be assessed but in their representative capacity only. What s 254(1)(b) does is emphasise that in respect of the income or the profits or gains referred to in sub-s (1)(a), the obligation of an agent or trustee to make a return and be assessed (as if the taxpayer) is in their representative capacity only. It is ancillary liability. Its purpose is to ensure payment of the tax; tax which at least ordinarily will be primarily payable by another person or entity. Adapting what Viscount Cave said in *Williams v Singer*[183] when considering similar provisions in the United Kingdom, "[t]he object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found".

175 The "collecting" aspect is then addressed in s 254(1)(d) and (e). Sub-section (1)(d) provides that an agent or trustee is both authorized and required to retain "so much as is sufficient to pay tax which is or will become due in respect of the income, profits or gains". That reference to the "income, profits or gains" in the last line is, of course, a reference to the "income, or any profits or gains of a capital nature" referred to in sub-s (1)(a), which is the foundation for the liability imposed by that provision. Paragraph (e) of s 254(1) creates the personal liability of the agent or trustee and limits that liability to the amount which was or should have been retained under s 254(1)(d).

176 It is, then, apparent that s 254 is a section with two purposes. It both imposes liability and is a collecting section. As the Commissioner correctly

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183 [1921] 1 AC 65 at 72.

submitted, s 254 imposes on a trustee[184] liability for tax in respect of income, or any profits or gains of a capital nature, derived in their representative capacity, as an aid to collection of that tax[185].

177 On the proper construction of s 254, there is no need to find another specific section in the revenue law rendering the agent or trustee liable for tax in respect of the "income, or any profits or gains of a capital nature" referred to in s 254(1)(a). If an agent or trustee has a liability under s 254(1)(e) because they failed to satisfy the retention obligation in s 254(1)(d), that liability is in addition to, and not in substitution for, any assessment of the beneficiary, principal or company (although of course only one amount of tax could ultimately be recovered)[186]. The contrary view adopted by the majority of the Full Court should be rejected.

178 The application of s 254, construed in the manner indicated, to the facts in these appeals is instructive. Under s 106-35 of the 1997 Act, the disposal of the Crestmead Property by the Liquidators was, for the purposes of Pts 3-1 and 3-3 of the 1997 Act, to be treated "as if the act had been done instead by [ABS]". The capital gain arising from that disposal entered the calculation of ABS's net capital gain and, then, ABS's assessable income[187]. ABS was principally liable and assessable for the capital gain arising on the sale of the Crestmead Property. That is not in dispute.

179 But ABS was in liquidation and it was the Liquidators who caused ABS to enter into a contract of sale for the Crestmead Property. Those facts were essential to both the derivation of a capital gain and the application of s 254 in the present appeals.

Issue 3 – retention authorization and obligation

180 As has been seen, the principal issue in these appeals concerns the proper construction of the retention authorization and obligation in s 254(1)(d) of the 1936 Act and, in particular, whether that retention authorization and obligation

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184 And imposes on an agent a liability for tax in respect of income, or any profits or gains of a capital nature, derived by the principal by virtue of their agency.

185 See also *Fermanis v Cheshire Holdings Pty Ltd* (1990) 1 WAR 373 at 377.

186 *Webb v Syme* (1910) 10 CLR 482 at 507; *Syme v Commissioner of Taxes for Victoria* (1914) 18 CLR 519 at 523; [1914] AC 1013 at 1018-1019. In relation to alternative assessments, see *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; [1995] HCA 23.

187 s 102-5 of the 1997 Act.

only applies after the Commissioner makes an assessment in respect of relevant income, profits or gains.

181 Both the primary judge and the Full Court held that the retention authorization and obligation in s 254(1)(d) only applies after an assessment is made. The primary judge[188] and Davies J in the Full Court[189] reached their conclusions by an application of the reasoning of this Court in *Bluebottle UK Ltd v Deputy Commissioner of Taxation*[190] in relation to the phrase "is or will become due" in s 255(1)(b) of the 1936 Act. The applicability of *Bluebottle* will be addressed later in these reasons. For the moment, it is sufficient to observe that the decision in *Bluebottle* is not determinative of the proper construction of s 254. The conclusion of Edmonds and Collier JJ in the Full Court was based on their reasoning addressed in "Issue 1 – s 254 and Div 6 of Pt III of the 1936 Act" and "Issue 2 – s 254 of the 1936 Act imposes ancillary liability and is a collecting provision" above and, for the reasons stated in those sections, should not be accepted.

182 What then is the proper construction of the retention authorization and obligation in s 254(1)(d)? For the reasons that follow, the retention authorization and obligation in s 254(1)(d) applies on and from the *derivation* of income, profits or gains by the agent or trustee. That obligation applies both before and after any assessment is made for tax in respect of that income or those profits or gains, not merely from the time of the assessment (if any).

183 This section of the reasons will address (1) the text, context and history of s 254 of the 1936 Act[191], (2) the duties and obligations of a trustee and a liquidator under the general law, (3) the position of an agent, (4) the absurdity that would result if the contrary construction was adopted and (5) the decision of this Court in *Bluebottle*.

(1) Text, context and history of s 254

184 Section 254(1)(a) defines an agent or trustee's obligations by reference to the nature of the obligation, the categories of receipts covered and an end point. As has been seen, an agent or trustee (including a liquidator) is made answerable

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188 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 621-623 [20]-[25].

189 *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2014) 226 FCR 263 at 274 [35].

190 (2007) 232 CLR 598 at 624-628 [71]-[82].

191 See [151]-[154] above.

"as taxpayer" by s 254(1)(a). That paragraph identifies that the nature of the obligation of the agent or trustee is "as taxpayer" and is for the doing of *all* such things as are required to be done by virtue of the revenue law.

185 But that liability of an agent or trustee, as taxpayer, is qualified. The qualification is important because it identifies, within the text of the provision, the central concept which recurs throughout s 254. The qualification is that the liability of each agent or trustee as taxpayer is not at large. It is limited by the character of the receipts. The liability is limited to liability "in respect of the income, or any profits or gains of a capital nature, derived by him or her in his or her representative capacity, or derived by the principal by virtue of his or her agency". It is in respect of those amounts, and only those amounts, that the agent or trustee is answerable as taxpayer for the payment of tax. So, for example, a liquidator is not liable for the payment of tax on income, profits or gains made by the company before their appointment as liquidator.

186 The fact that an agent or trustee is answerable as taxpayer is amplified in s 254(1)(b). Section 254(1)(b) provides that an agent or trustee shall, in respect of the income, profits or gains referred to in sub-s (1)(a), make the returns and be assessed. That amplification is unsurprising. Under s 254(1)(a), an agent or trustee is answerable as taxpayer and obliged to do all such things as are required to be done by virtue of the revenue law in respect of that income or those profits or gains, including paying the tax. The obligation in sub-s (1)(b) might be thought to be subsumed in sub-s (1)(a). But, however sub-ss (1)(a) and (1)(b) are read, an obligation is imposed on an agent or trustee, as taxpayer, to make all due inquiries and keep all due records to ensure a proper return can be made in relation to the income, profits or gains referred to in sub-s (1)(a).

187 As seen earlier, s 254(1)(b) emphasises that the obligation of an agent or trustee to make a return and be assessed (as taxpayer) is in their representative capacity only. It is ancillary liability[192]. Its purpose is to ensure the payment of tax; tax which at least ordinarily will be primarily payable by another person or entity. It creates a liability "*quoad* assets" which imposes a debt to be borne by the estate, the principal or the company[193]. The balance of s 254 assists to achieve that objective.

188 Paragraphs (d) and (e) of s 254(1) address the collecting aspects of the statutory scheme. Sub-section (1)(d) provides that an agent or trustee is both authorized and required to retain "so much as is sufficient to pay tax which is or will become due in respect of the income, profits or gains". That reference to

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192 See [171]-[177] above.

193 *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 42; [1958] HCA 2.

"income, profits or gains" is, of course, a reference to the "income, or any profits or gains of a capital nature" referred to in s 254(1)(a): the "income, or any profits or gains of a capital nature" derived by the trustee in their representative capacity (or by the principal by virtue of the agency). Section 254(1)(d) then specifies the amount that the agent or trustee is authorized and required to retain – "so much as is sufficient to pay tax which is or will become due in respect of the income, profits or gains". The "tax", of course, is the tax which the agent or trustee is answerable as taxpayer to pay under s 254(1)(a), and the agent or trustee is authorized and required to retain "so much as is sufficient to pay" that tax.

189 Two further questions of construction arise: what is "sufficient", and what is the proper construction of the phrase "which is or will become due in respect of the income, profits or gains"?

190 The answer to the first question informs, or at least assists in informing, the answer to the second question. And the answer to the first question depends again on a proper understanding of the statutory scheme.

191 Section 254(1)(d) is a facilitating provision. It facilitates the tax payment obligation in s 254(1)(a) by stating that the agent or trustee is "authorized and required to retain" certain money. The form and content of that provision is important.

192 Absent s 254(1)(d), there may be some argument about whether the retention by the agent or trustee of money belonging to another (an estate, a principal or a company), in the face of a demand from that person or entity, would be unlawful. On any view, s 254(1)(d) puts the matter beyond argument. Subject to important limitations contained within other sub-sections of s 254, s 254(1)(d) intersects with, and interrupts, any instruction to the agent or trustee for delivery up of money belonging to a beneficiary, a principal or a company and held by that agent or trustee[194].

193 Other aspects of s 254(1)(d) should be noted. The retention authorization and obligation imposed on the agent or trustee is "to retain from time to time out of any money which comes to [the agent or trustee] so much as is sufficient to pay tax". The obligation to retain *from time to time* reflects that the obligation is ongoing and that money may not (and often will not) come to an agent or trustee in one lump sum. It reflects reality. But the retention authorization and obligation has just one purpose – to meet the tax payment obligation imposed on the agent or trustee in s 254(1)(a).

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194 cf *Federal Commissioner of Taxation v Resource Capital Fund IV LP* (2013) 215 FCR 1 at 10-11 [38], in relation to s 255(1)(b).

194 The authorization and obligation to retain is limited to so much as is *sufficient* to pay tax that *is or will become due in respect of the income, profits or gains*, being the income, profits or gains in s 254(1)(a). As Barton J explained in *Webb v Syme*[195], it enables and requires the agent or trustee to "keep back out of the trust [or agency] receipts enough to pay the tax if it is not obtained from the beneficiary [or principal] and demand is made on himself". If the money belonging to the principal or beneficiary (or in this case, the company in liquidation) that comes to the agent or trustee exceeds that which is sufficient to pay tax on the income, profits or gains, as required by s 254(1)(a), the agent or trustee is not authorized to retain the excess.

195 How then does the agent or trustee determine what is *sufficient* to be retained? The upper limit of that obligation will be known, or will be readily ascertainable, by any agent or trustee. It is the amounts with which the agent or trustee deals that both found the relevant tax liability and mark the outer boundary of that liability[196]. The agent or trustee can apply the relevant marginal tax rate to the particular income, profits or gains with which the agent or trustee deals to determine how much to retain. If the agent or trustee later becomes aware of allowable deductions or losses which will reduce the amount of tax payable on the income, profits or gains, then the amount retained can be adjusted. Moreover, as discussed later in these reasons, not only is the retention of funds not an unusual task for a trustee, a liquidator, or an agent, it is a task which pervades their roles and functions.

196 Section 254(1)(e) is in aid of s 254(1)(d). It imposes a personal liability on the agent or trustee "for not keeping a reserve of income or funds in hand to satisfy the tax, until it is seen whether it is paid by or recoverable from the beneficiary [or principal]"[197].

197 Section 254(1)(h) "helps to show where the primary liability really is. It gives the Commissioner the like remedies against all … property of any kind vested in, controlled, or managed by any trustee as he would have against the … property"[198] of any other taxpayer in respect of tax. As Barton J said in *Webb v Syme*[199], "although power has been given to make a beneficiary's property in the

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195 (1910) 10 CLR 482 at 497, referring to s 12(1)(c) of the 1895 Act, a predecessor provision.

196 *Bluebottle* (2007) 232 CLR 598 at 629 [84], in relation to s 52(e) of the 1915 Act.

197 *Webb v Syme* (1910) 10 CLR 482 at 498, referring to s 12(1)(c) of the 1895 Act.

198 *Webb v Syme* (1910) 10 CLR 482 at 498, referring to s 12(3) of the 1895 Act.

199 (1910) 10 CLR 482 at 498, referring to s 12(3) of the 1895 Act.

hands of the trustee liable, as if it were in the hands of the owner himself, it is still recognised that the trustee is not the person 'liable to pay tax'". The object was then, and remains now, to enable "the Commissioner to resort to the trustee to prevent any risk of the beneficiary's income escaping the payment legally due"[200]. As Barton J went on to say, "[i]t is primarily the beneficiary who is to pay; but the amount of the tax is to come out of his [or her] income in any event – *if necessary, before it comes to his [or her] hands*"[201] (emphasis added). The obligation, the payment of the tax before the balance is handed over to the beneficiary or principal, applies regardless of whether there has been an assessment[202].

198 These statements, and the features of s 254 that have been outlined above, support the construction that the phrase "which is or will become due in respect of the income, profits or gains" does not depend on there being an assessment issued by the Commissioner. The retention authorization and obligation is not restricted to the period *after* an assessment has issued for the income, profits or gains. It arises on and from the derivation of that income or those profits or gains.

(2) Duties and obligations of a trustee and a liquidator under the general law

199 That construction of s 254 reflects, and is consistent with, the duties and obligations of a trustee and a liquidator under the general law. Retention of moneys by a trustee or a liquidator is not new. Just as at general law a trustee is entitled to retain trust property against a beneficiary pending determination of contingent liabilities of the trust for which the trustee is liable[203], under s 254(1)(d) an agent or trustee is authorized and required to retain moneys sufficient to pay tax which is or will become due in respect of income, profits or gains made by the agent or trustee in a representative capacity[204]. It would be

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200 *Webb v Syme* (1910) 10 CLR 482 at 498.

201 *Webb v Syme* (1910) 10 CLR 482 at 498.

202 See, for example, *The Commissioners of Taxation v Abbey* (1901) 1 SR (NSW) (L) 4 at 6.

203 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335-336; [1945] HCA 37; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367; [1979] HCA 61; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245-247 [47]-[51]; [1998] HCA 4.

204 *Lym International Pty Ltd v Westpac Banking Corporation* [2011] NSWSC 927 at [18]-[19].

strange if s 254 was construed in a way that was inconsistent with the duties of a trustee under the general law[205].

200 In relation to a liquidator, s 254 therefore puts beyond doubt the existence of a right and an obligation that would otherwise exist. Further, the construction of s 254(1)(d) that has the retention authorization and obligation applying on and from *derivation* is consistent with a liquidator's duties and obligations under, and the priority of payments provided for in, the Corporations Act. These reasons will now explain how that is so.

201 A liquidator may carry on the company's business only so far as is necessary for the beneficial disposal or winding up of that business[206]. A liquidator's other powers, including the power to sell or otherwise dispose of, in any manner, all or any part of the property of the company[207], are set out in s 477(1) and (2) of the Corporations Act[208]. As seen earlier, the company's property does not vest in the liquidator. Instead, the liquidator, in a representative capacity, in place of the directors or officers of the company, is authorised to do certain things including those specified in s 477(1) and (2) of the Corporations Act.

202 The Corporations Act deals separately with the debts of a company according to whether the debts were incurred before or after the appointment of a liquidator. Section 553 relevantly provides:

> "(1) Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), *being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company*.
>
> (1A) Even though the circumstances giving rise to a debt payable by the company, or a claim against the company, occur on or after the relevant date, the debt or claim is admissible to proof against the company in the winding up if:

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205 See, for example, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 308 [308]; [2013] HCA 39.

206 ss 477(1)(a), 493 and 506(1)(b) of the Corporations Act.

207 s 477(2)(c) of the Corporations Act.

208 See also ss 501 and 506(1)(b) of the Corporations Act in relation to a voluntary winding up.

(a) the circumstances occur at a time when the company is under a deed of company arrangement; and

(b) the company is under the deed immediately before the resolution or court order that the company be wound up." (emphasis added)

203 The only debts and claims "admissible to proof against the company" are "debts or claims the circumstances giving rise to which occurred *before* the relevant date"[209] (emphasis added). Section 555 provides that "[e]xcept as otherwise provided by this Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately". The Crown, as a creditor, is bound by this statutory order[210].

204 Subdivision 260-B of Sched 1 to the *Taxation Administration Act* 1953 (Cth) ("the TAA") deals with recovery from liquidators. It provides what a liquidator and the Commissioner must do. First, a liquidator must give written notice of the fact that he or she was appointed liquidator of a company to the Commissioner within 14 days of appointment[211]. Next, the Commissioner must, as soon as practicable, notify the liquidator of the amount (the "notified amount") that the Commissioner considers is enough to discharge any outstanding tax-related liabilities that the company has *when the notice is given*[212]. These are pre-appointment tax-related liabilities. The liquidator must not, without the Commissioner's permission, part with any of the company's assets before receiving the Commissioner's notice[213]. However, that prohibition does not prevent the liquidator from parting with the company's assets to pay debts of the company not covered by the matters set out in s 260-45(5), which include the outstanding tax-related liabilities and any debts of the company which are unsecured and are not required, by an Australian law, to be paid in priority to some or all of the other debts of the company[214]. Finally, after receiving the Commissioner's notice, the liquidator must set aside, out of the assets available

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209 In these appeals, the relevant date for ABS is the day on which the administration began: ss 9, 513B(b), 513C(b) of the Corporations Act.

210 s 5A(2) of the Corporations Act.

211 s 260-45(2) of Sched 1 to the TAA.

212 s 260-45(3) of Sched 1 to the TAA.

213 s 260-45(4) of Sched 1 to the TAA.

214 s 260-45(5) of Sched 1 to the TAA.

for paying amounts covered by s 260-45(5)(a) or (b) (the "ordinary debts"), assets with a value calculated using a specified formula[215]. None of these provisions address post-liquidation debts or claims.

205 What then is to occur post-liquidation? That is addressed by s 556 of the Corporations Act. It relevantly provides:

> "(1) *Subject to this Division*, in the winding up of a company the *following debts and claims must be paid in priority to all other unsecured debts and claims*:
>
> (a) first, expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company's business;
>
> …
>
> (dd) next, any other expenses (except deferred expenses) properly incurred by a relevant authority;
>
> (de) next, the deferred expenses[216];
>
> …" (emphasis added)

206 A "relevant authority" in relation to a company includes a liquidator[217].

207 A tax expense is an expense incurred by a liquidator. A tax expense may fall within s 556(1)(a) (an expense incurred in preserving, realising or getting in property of the company, or in carrying on the company's business) or s 556(1)(dd) (other expenses). It is not a question of priority for the Commissioner but a reflection of, and consistent with, the statutory scheme under the Corporations Act that post-liquidation creditors are to be treated equally, "in priority to all other unsecured debts and claims" and paid in a particular order.

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215 s 260-45(6) of Sched 1 to the TAA.

216 "[D]eferred expenses" in relation to a company include expenses properly incurred by a liquidator in so far as they consist of remuneration, or fees for services, payable to the liquidator: s 556(2) of the Corporations Act. The distinction between pre- and post-liquidation debts or claims is reinforced by s 558 of the Corporations Act, dealing with debts due to employees, and s 260-45 of Sched 1 to the TAA.

217 s 556(2) of the Corporations Act.

Of course, those post-liquidation debts are not limited to capital gains tax. They may include GST and income tax.

208 Two judgments at first instance which have considered s 254 and tax expenses – *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd*[218] and *Benedict v Olde; in the matter of ATS (Asia Pacific) Pty Ltd*[219] – are instructive in the fact and manner of treatment of tax expenses incurred by receivers and liquidators. *Lanepoint* addressed s 254 of the 1936 Act in the context of receivers who, in the course of their duties, had generated income and derived a capital gain. French J (sitting as a single judge of the Federal Court) did not resolve the competing legal contentions concerning s 254 but held that the receivers were entitled to take the view that they were obliged to make appropriate provision against tax liabilities[220]. *Benedict* concerned an application to terminate the winding up of a company in liquidation. There was a potential for liability for tax in respect of the trading undertaken during the period of liquidation. The liquidator sought directions and a regime was put in place to provide for the payment of "Expenses incurred by the Liquidator during the Liquidation"[221]. The State and federal taxes listed in the Order as "expenses" included employee PAYG tax payable to the Commissioner, GST payable to the Commissioner and payroll tax payable to the Office of State Revenue in Western Australia.

209 For those reasons, a liquidator's duties under, and the priority of payments provided for in, the Corporations Act are consistent with the construction of s 254(1)(d) that has the retention authorization and obligation applying on and from derivation.

(3) Agents

210 Section 254 also applies to agents. "Agent" is not exhaustively defined in the 1936 Act or the 1997 Act[222]. It is notorious that it is a word which can be used in many different ways with many different meanings[223]. The extent to

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218 (2006) 64 ATR 524.

219 [2011] FCA 1008.

220 *Lanepoint* (2006) 64 ATR 524 at 536 [57].

221 *Benedict* [2011] FCA 1008 at Order 4, [14]-[21].

222 See s 6(1) of the 1936 Act and ss 960-105 and 995-1 of the 1997 Act.

223 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50; [1931] HCA 53.

which, and the manner in which, s 254 operates in relation to an agent is not the subject of these appeals. It is, however, appropriate to notice two facts and matters which may bear on those questions. They are facts and matters which illustrate that the construction of s 254(1)(d) that has the retention authorization and obligation applying on and from derivation will not result in practical difficulties in its application to an agent.

211 First, in its express terms, s 254 does not extend to all agents. It applies to "income, or any profits or gains of a capital nature", which have been "derived by the *principal* by virtue of his or her agency"[224] (emphasis added). That conclusion about the scope of s 254 is reinforced by the reference in s 254(1)(b) to the fact that the agent is obliged to lodge a return "in his or her representative capacity only" and the further reference in s 254(1)(d) that the retention authorization and obligation only extends to money "which comes to him or her in his or her representative capacity".

212 Second, in relation to the predecessors to s 254, the view that has prevailed (since at least 1896) is that "[t]he word 'agent' obviously cannot extend to every agent for whatever purpose he [or she] may be employed"[225]. The predecessor sections were held to extend to persons who were connected with the principal's business *and* who received the gross proceeds (in which the net proceeds are included)[226]. "Agent" was limited to those persons "who have charge and control"[227], "direction, control or management"[228] or "management, receipt, disposal or control"[229] of the income, profits or gains which would otherwise escape duty altogether. Indeed, the Commissioner may (and does) determine by notice in writing served on the "agent" that the Act, or a provision of the Act, applies to an entity as if the entity were an agent of another entity[230].

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224 s 254(1)(a) of the 1936 Act.

225 *Grainger & Son v Gough* [1896] AC 325 at 337.

226 See, for example, *Tarn v Scanlan* [1928] AC 34 at 43.

227 See, for example, *R v Newmarket Income Tax Commissioners; Ex parte Huxley* [1916] 1 KB 788 at 793.

228 See, for example, *Drummond v Collins* [1915] AC 1011 at 1021.

229 See, for example, *In re Mary Willis* (1907) 7 SR (NSW) 435 at 443.

230 s 960-105(2) of the 1997 Act.

(4) Absurdity

213 The contrary construction of s 254, that the retention authorization and obligation under s 254(1)(d) would only arise *after assessment*, not only is inconsistent with the evident purpose of s 254, the text of s 254 and the other legal obligations of trustees (including liquidators) but leads to (or at least has the capacity to lead to) absurd results.

214 The contrary construction is inconsistent with the evident purpose of the provision because it would leave the agent or trustee vulnerable between the time of derivation of the income, profits or gains and the time of assessment to claims by the principal or beneficiary for payment over of that income or those profits or gains, thereby denying the agent or trustee the means to pay the tax in respect of that income or those profits or gains. That denial of means to pay would directly conflict with, and contradict, the statutory direction in s 254(1)(a) and (b) that the agent or trustee is answerable as taxpayer in respect of that income or those profits or gains and for payment of the tax thereon.

215 It could also lead to absurd results. The effect of accepting that the retention authorization and obligation under s 254(1)(d) only arises *after assessment* would be that in many cases the income, profits or gains that would generate the tax liability will have been distributed by the agent or trustee before the obligation to pay the tax arises. The agent or trustee would then seek to recoup the tax on the income, profits or gains in year 1 from those (if any) generated in year 2. That result ignores critical aspects of, and the text of, s 254[231].

216 It also ignores reality. There are at least two matters that need to be considered. First, the assessment process is now one of self-assessment – generally a system where the Commissioner is taken to have made, on the day the return is filed, an assessment of the relevant taxable income or net income and of the tax payable on that taxable income or net income, being the amounts as specified in the return[232]. It would be an odd result that a trustee (including a liquidator) could meet their obligations (under both the revenue law and the general law) to prepare a return for filing by way of self-assessment, recognise that tax is payable on the income, profits or gains derived by them in their representative capacity, but then distribute the funds sufficient to pay that tax immediately before filing the return.

217 Second, the contrary construction ignores the fact that a liquidation effectively comes to an end when the liquidator has realised and distributed all

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231 See [171]-[177] above.

232 s 166A of the 1936 Act.

the company's available property and made their report to the Australian Securities and Investments Commission. In many liquidations, that occurs relatively quickly and without the need for the company in liquidation to file an income tax return. In those cases, on the construction contended for by the Liquidators, the obligation to retain would never arise because a return would not be lodged and a deemed assessment would never be raised. Such a result is contrary to the express terms of s 254.

(5) Bluebottle

218 The construction this Court accorded to s 255(1)(b) of the 1936 Act, and, in particular, the words "is or will become due", in *Bluebottle* is inapplicable to s 254.

219 As acknowledged by this Court in *Bluebottle*[233], although there are "obvious similarities" in the wording of the retention authorization and obligation requirements in ss 254(1)(d) and 255(1)(b), the context of s 254 (and its predecessors) is "radically different" from s 255. The Commissioner identified a number of relevant differences. Those differences included the class of persons affected and their different tasks and roles, the different relationship each class has with the identified income, profits or gains, the different point at which the obligations attach, the different nature of the obligations imposed, the different subjects of the retention authorization and obligation and that the remedial powers in s 254 do not exist in s 255. The Commissioner's submissions should be accepted. It is to the differences identified by the Commissioner I now turn.

220 First, the *class* of persons to whom s 254(1) applies is different from and wider than the class of persons to whom s 255 applies. Section 255 applies to persons ("controllers") who have receipt control or disposal of moneys belonging to non-residents where it is the non-resident who has derived income, profits or gains from a source in Australia, or where the non-resident is a shareholder in a company deriving income, profits or gains from a source in Australia. Section 254(1) applies to a person falling within the definition of "trustee" in the 1936 Act, and to an "agent"[234], who has derived income, profits or gains in a representative capacity.

221 Second, the *classes of persons affected are in different positions*. The Court in *Bluebottle*[235], when dealing with s 255, stated that "there is no reason to

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233 (2007) 232 CLR 598 at 629 [84], comparing s 255(1)(b) with s 52(e) of the 1915 Act. See also at 632 [92]-[93], comparing s 255 with s 218 of the 1936 Act.

234 See [210]-[212] in relation to "agent".

235 (2007) 232 CLR 598 at 627 [79].

suppose that the controller of a non-resident's money would ordinarily, let alone invariably", have information to place them "in a position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives". That stands in stark contrast with the position of a trustee (including a liquidator) and an agent under s 254, which is likely to enable them to have, or acquire, a much greater familiarity with the taxation affairs of the beneficiary or principal. Indeed, as seen earlier, s 254(1) assumes and requires such familiarity by obliging (in s 254(1)(b)) the agent or trustee to make returns in relation to the income, profits or gains derived in their representative capacity. Moreover, the focus of the retention authorization and obligation in s 254(1)(d) is the amount sufficient to pay the tax in respect of the income, profits or gains derived in their representative capacity. The agent or trustee would know the amount of income, profits or gains they have derived in their representative capacity. Under s 255(1)(b), a controller does not necessarily know or understand a beneficiary or principal's taxation affairs for the relevant income year. They are simply in control of money belonging to a non-resident and respond to a notice requiring them to pay the tax specified in the notice from the money they control.

222 Third, the *relationship* of the agent or trustee in s 254 with the income, profits or gains the subject of the tax referred to in s 254(1)(a) is different from the relationship a controller has with the income, profits or gains referred to in s 255. In s 254, the agent or trustee derives the income, profits or gains in their representative capacity and pays tax on that income or those profits or gains. The relationship under s 254 is direct – consistent with the purposes of the section[236]. In s 255, the moneys held by the controller need not have any relationship with the income, profits or gains derived by the non-resident or company the subject of the tax liability. Under s 255, the controller may be a complete stranger to the derivation of the income, profits or gains the subject of the tax. The controller simply has receipt, control or disposal of money belonging to a non-resident. The non-resident is the person who derives income, profits or gains from a source in Australia or who is a shareholder in a company deriving income, profits or gains from a source in Australia.

223 Fourth, the *point at which the obligations attach* to an agent or trustee under s 254 is different from the point at which they attach to a controller under s 255. Under s 255, it is only when the tax of the non-resident has become "due and payable by the non-resident" under s 255(1)(a) through an assessment of the non-resident that the controller can be required, by notice under s 255 issued to them, to pay the tax of the non-resident[237]. Under s 254(1), the obligation

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236 See [176] above.

237 *Bluebottle* (2007) 232 CLR 598 at 626-627 [77].

engages at an earlier point in time – at the point of derivation of the income, profits or gains by the agent or trustee. It is at that point, and by force of s 254 itself, that the requirements of s 254(1)(a) and (b) attach to the agent or trustee.

224 Fifth, the *nature of the obligations* cast on an agent or trustee under s 254 is different from the nature of the obligations cast on a controller under s 255. As seen earlier, by making the agent or trustee "answerable as taxpayer", s 254 casts on them a wide-ranging responsibility to ensure assessment, and payment, of the tax due in respect of the income, profits or gains they derived in their representative capacity. That obligation arises before the time of the assessment of the income, profits or gains and includes the obligation to make returns and a liability to be assessed for the tax due in respect of the income, profits or gains[238]. Section 255 does not make the controller "answerable as taxpayer", oblige them to make returns or render them liable to assessment on the income, profits or gains relating to the non-resident. It merely obliges them, when required by notice under s 255 being issued to them, to pay the tax that has been assessed to the non-resident from money of the non-resident which they control.

225 Sixth, the *subject* of the retention authorization and obligation in s 254(1)(d) is the amount which is sufficient to pay tax which is or will become due in respect of the income, profits or gains derived by the agent or trustee in their representative capacity. Accordingly, as was pointed out in *Bluebottle*[239], it is the amounts with which the agent or trustee deals that establish the relevant tax liability and mark its outer boundary[240]. Under s 255(1)(b), the subject of the retention authorization and obligation is the amount sufficient to pay the tax which is or will become due by the non-resident. It could encompass the whole of the non-resident's taxation affairs in a relevant income year.

226 Seventh, s 255 *lacks a remedial provision*. Section 254(1)(h) further assimilates the position of an agent or trustee deriving income, profits or gains in a representative capacity to that of a taxpayer. It does that by giving the Commissioner, in respect of the income, profits or gains, the same remedies against the attachable property vested in or under the control or management or in the possession of the agent or trustee that the Commissioner would have against the property of any other taxpayer[241]. Section 255 has no similar provision. The different statutory scheme created by s 255 does not require it.

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238 See [186]-[187] above in relation to s 254(1)(b).

239 (2007) 232 CLR 598 at 629 [84].

240 See [195] above.

241 See [197] above.

227 "Judicial decisions on similar or identical legislation … are guides to, but cannot control, the meaning of legislation"[242]. "Judicial decisions are not substitutes for the text of legislation"[243]. In determining whether a decision on the construction of a phrase in one section can be applied in the construction of that phrase in another section, close analysis of the critical steps in the construction of the section is necessary.

228 That kind of close analysis reveals that the construction of the phrase "is or will become due" which the Court adopted in *Bluebottle*[244] in relation to s 255 is inapposite to that phrase in s 254. In *Bluebottle*[245], critical to the construction of s 255(1)(b) was the intersection between the retention authorization and obligation in s 255(1)(b) and the obligation to pay in s 255(1)(a). The obligation to pay in s 255(1)(a) is an obligation to, when *required by notice* by the Commissioner under s 255 being issued to a controller, pay amounts assessed to the non-resident. The retention authorization and obligation in s 255(1)(b) intersected with, and was informed and given content by, what was sufficient to meet that obligation. Accordingly, the words "is or will become due" in s 255(1)(b) were construed as referring to tax assessed to the non-resident, although not yet payable[246].

229 What then is the position with s 254? The primary judge[247] observed in s 254 the same "intersecting obligation" to which this Court referred in *Bluebottle* in relation to s 255. That statement, with respect, was incorrect. Section 254(1)(d) does intersect with and support the obligations in s 254(1)(a) and (b). But, as seen earlier[248], those obligations are different and more comprehensive,

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242 *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 633 [62]; [2001] HCA 37; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270 [31]; [2008] HCA 5. See also *Bluebottle* (2007) 232 CLR 598 at 632 [92]-[93].

243 *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 633 [62]; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270 [31].

244 (2007) 232 CLR 598 at 628 [81]-[82], 632 [92]-[93].

245 (2007) 232 CLR 598 at 628 [81]-[82], 632 [92]-[93].

246 *Bluebottle* (2007) 232 CLR 598 at 627-628 [79]-[81], referring to *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1; [1981] HCA 40.

247 *Australian Building Systems Pty Ltd (ACN 094 238 678) (in liq) v Commissioner of Taxation* (2014) 97 ACSR 614 at 622 [22].

248 See [222]-[224] above.

arise at an earlier time and are imposed on persons in a different position in relation to the income, profits or gains the subject of tax compared to those the subject of notice under s 255. Put another way, the nature and timing of the obligations in s 254(1)(a) and (b), with which s 254(1)(d) intersects and which s 254(1)(d) supports, are different from those in s 255(1)(a). The point of intersection, and the timing of engagement, of the retention authorization and obligation in s 254(1)(d) is different from, and earlier than, that in s 255(1)(b).

Conclusion

230 For those reasons, the appeals should be allowed.