TD 2019/D2 - Income tax: what is a receiver's obligation to retain money for post-appointment tax liabilities under section 254 of the Income Tax Assessment Act 1936?

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This document has been finalised by TD 2021/5.

There is a Compendium for this document: **TD 2021/5EC** .

Draft Taxation Determination

Income tax: what is a receiver's obligation to retain money for post-appointment tax liabilities under section 254 of the *Income Tax Assessment Act 1936*?

Relying on this draft Ruling

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if the draft ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

Summary – what this Ruling is about

1. This draft Determination[1] explains the Commissioner's view on a receiver's obligation to retain money where the entity in receivership has an assessed post-appointment tax liability. It only applies to receivers appointed as agent for the entity, and consequently, does not apply to mortgagees in possession or their agents.

Ruling

2. At times, income, profits or gains of a capital nature are derived by an entity through[2] the actions of a receiver acting as the entity's agent. When this happens, the receiver must retain enough money to pay the tax that has been assessed[3] on the income, profits or gains.

3. This obligation to retain only applies to money that has come to the receiver in their capacity as agent for the entity.

4. Once an assessment has been made the obligation to retain remains ongoing. The money does not have to have come to the receiver in a lump sum.[4]The amount that is

[1] All further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.
[2] Paragraph 254(1)(a) of the *Income Tax Assessment Act 1936* (ITAA 1936) makes every agent and trustee answerable as taxpayer for the doing of all things required by the tax laws for the income, profits or gains of a capital nature derived by them in their representative capacity or derived by the taxpayer 'by virtue of' their agency. We consider 'through' means the same as 'by virtue of' in this provision.
[3] *Commissioner of Taxation v Australian Building Systems Pty Ltd (In liquidation)* [2015] HCA 48.
[4] *Commissioner of Taxation v Australian Building Systems Pty Ltd (In liquidation)* 2015] HCA 48, paragraph 193.

retained does not have to exceed the amount of income tax that can be legally recovered by the Commissioner from the entity.[5]

Example 1 – receiver disposes of capital asset

5. *Kathleen's Kites Pty Ltd purchases a capital asset for $100,000 in 2008.*

6. *The asset is worth $200,000 in 2017 when Big Bank Co (a secured creditor of Kathleen's Kites) appoints Dipika as receiver under a deed of appointment. The deed specifies Dipika as agent for Kathleen's Kites.*

7. *In 2018, during the receivership, Dipika disposes of the asset for $210,000. Any capital gain or loss made on the sale is made by Kathleen's Kites, not Dipika.*[6]

8. *Kathleen's Kites' capital gains tax (CGT) liability relates to the whole of the $110,000 capital gain.*[7] *In our view, Kathleen's Kites has, through Dipika's agency, derived a gain of a capital nature of the same amount. This satisfies the requirements in paragraph 254(1)(a) of the ITAA 1936*[8] *and any tax assessed on that gain gives rise to the retention obligation in paragraph 254(1)(d).*

9. *Kathleen's Kites lodges an income tax return for the 2018 income year that reports the $110,000 capital gain made by Kathleen's Kites. The income tax payable on the gain is assessed. Once the assessment is made Dipika must retain (out of money that comes, or has already come, to her as receiver of Kathleen's Kites) enough money to pay the tax assessed. However, the amount that needs to be retained is limited to the amount of the assessed income tax that the Commissioner can legally recover from the entity.*

10. *Although Dipika is personally liable for the tax assessed on the capital gain, that liability is limited to the amount that she has retained, or should have retained, under paragraph 254(1)(d). She is not otherwise personally liable for the assessed tax.*

Example 2 – receiver continues trading

11. *Big Bank Co crystallises its fixed and floating charge over all of Ben's Balloons Pty Ltd assets and appoints Dipika to act as receiver. The deed of appointment specifies Dipika as an agent for Ben's Balloons.*

12. *During the 2018 income year, Ben's Balloons continues to make trading profits while in receivership. Although Dipika, as receiver, has management and control of the debtor's income, it is Ben's Balloons that derives the income, not Dipika. Ben's Balloons derives the income through Dipika's agency.*

13. *Ben's Balloons lodges an income tax return for the 2018 income year. The trading profits derived by Ben's Balloons during the receivership were taken into account in calculating the company's taxable income. The Commissioner assesses the income tax payable on that taxable income. Dipika is obliged to retain (out of money that comes, or has already come, to her as receiver of Ben's Balloons) enough money to pay the tax assessed to the extent the Commissioner can legally recover that tax.*

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[5] See paragraphs 20 to 23 of this Determination.
[6] This is true even if the asset vests in Dipika as receiver (section 106-60 of *the Income Tax Assessment Act 1997* (ITAA 1997)).
[7] We acknowledge the actual capital gain would likely be less than $110,000 but have simplified the facts for the purposes of this example.
[8] All legislative references in this Determination are to the ITAA 1936 unless otherwise indicated.

14. *Dipika is personally liable for the tax assessed on the trading profits to the extent of any amount that she has retained, or should have retained.*[9] *She is not otherwise personally liable for the tax.*

Date of effect

15. When the final Determination is issued, it is proposed to apply to arrangements that have started being carried out from the date of issue. This Determination will not apply to taxpayers to the extent it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
27 March 2019

[9] Paragraph 254(1)(e).

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

Section 254

16. Subsection 254(1) imposes a number of obligations on every agent and trustee for any income, profits or gains derived by them in their representative capacity, or derived by the principal through their agency. It creates a secondary tax liability for agents and trustees, ancillary to the primary tax liability. It also provides a means of collection against agents and trustees.[10]

17. Although tax law extends the definition of trustee to include a receiver[11], the nature and extent of a receiver's obligations under section 254 depends on whether the receiver is acting as agent for the debtor or creditor. This is determined by the terms of the security documentation under which the receiver is appointed and the relevant state and Commonwealth legislation.[12]

18. Where an assessed primary tax liability arises as a result of the actions of an agent, a secondary liability created by section 254 is imposed on that agent. Consequently, where an assessed primary tax liability arises as a result of the receiver acting as agent for the debtor, section 254 imposes a secondary liability on the receiver. The amount of the secondary liability is limited to the amount the receiver must retain from time to time under paragraph 254(1)(d).

19. In *Commissioner of Taxation v. Australian Building Systems Pty Ltd (In liquidation),* the High Court held that the retention obligation in paragraph 254(1)(d) does not arise until an assessment is made.[13]

20. Although not stated explicitly in section 254, we consider that the retention obligation in section 254 does not exceed the amount that the Commissioner can legally recover. In most circumstances this is the tax liability arising as a result of the assessment. There are, however, circumstances where the Commissioner's rights of recovery are constrained such that he cannot legally recover the full amount of the assessment. One such area concerns the interaction of the *Corporations Act 2001* and tax liabilities.[14] The Commissioner's right to a payment in respect of a tax liability may ultimately be determined by the corporations law, not the tax law.

21. In the case of a receiver the question is therefore, to what extent, if any, is the Commissioner's right of collection constrained by other applicable laws such that he cannot legally recover the full amount of the assessment?

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[10] *Commissioner of Taxation v Australian Building Systems Pty Ltd (In liquidation)* [2015] HCA 48, paragraph 171.
[11] Subsection 6(1) of the ITAA 1936.
[12] See paragraphs 25 to 27 of this Determination.
[13] *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (In liquidation)* [2015] HCA 48 per French and Keifel JJ, paragraph 39 and Gageler J, paragraph 58.
[14] In *Bell Group Limited (In liquidation) v Deputy Commissioner of Taxation* [2015] FCA 1056, Wigney J held that while a liquidator has an obligation to retain under paragraph 254(1)(d), it does not expressly deal with questions of payment, priority or preference. When such 'questions of priority do arise, they are to be determined by other provisions, in particular section 556 of the *Corporations Act 2001*'. Section 254 requires the 'liquidator to set aside amounts to meet expected tax debts, but leave[s] questions of payment and priority to the Corporations Act'.

22. For receivers, there is no generally applicable provision equivalent to section 556 of the *Corporations Act 2001*.[15] Consequently, tax liabilities incurred by a taxpayer after a receiver is appointed are simply unsecured debts with no greater priority to payment than any other unsecured debt. An exception to this could be where some other statute[16], or agreement, provides the Commissioner with an enforceable legal right to require payment before either other unsecured creditors or even secured creditors. This requires a careful examination of the various statutory provisions and their interactions.[17]

23. If the Commissioner has no enforceable right to be paid before a secured creditor then the receiver's retention obligation under section 254 relates to the amount that the Commissioner is entitled to be paid after the secured creditors are paid. If on the particular facts this amount is zero then there is no obligation to retain.

Agency

24. The relationship between a receiver and a debtor is determined by the terms of the security documentation under which the receiver is appointed and relevant state and Commonwealth legislation.

25. The security documentation under which the receiver is appointed usually expressly provides that the receiver is the agent of a debtor. Where such a statement is not included, an agency relationship can usually be inferred from the security documentation.[18]

26. The real property legislation in each Australian state and territory provides that a receiver appointed by a mortgagee is the agent of the debtor. Many deeds granting the mortgagee a right to appoint a receiver will do likewise.

27. Where the Court appoints a receiver, they are not appointed to act as agent of either the debtor or creditor. Instead, the receiver is an officer of the Court, appointed to discharge the Court's instructions by obtaining the valuation and effecting the sale of assets before applying the proceeds to debts as set out in the orders of the Court.

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[15] Section 556 of the *Corporations Act 2001* gives priority in the winding up of a company to the payment of certain unsecured debts and claims over all other unsecured debts and claims. See footnote 14 of this Determination.

[16] The property law statutes of various States and Territories are possible examples of such statutes as they generally provide that a receiver appointed by a mortgagee is under an obligation to apply money 'in discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property' (for example, section 53 of the *Law of Property Act 1936* (SA) and section 110 of the *Property Law Act 1958* (Vic)). The nature and extent of any such right will depend on the interaction of various statutory provisions (see footnote 12 of this Determination).

[17] See for example the discussion by the High Court in *Visbord v Federal Commissioner of Taxation* [1943] HCA 4 (*Visbord*) which concerned the interaction of the tax law with a provision of the relevant state's property law statute. Williams J observed that, in the context of this type of provision, 'it is probable that only the mortgagee who appointed the receiver, in an action brought against the receiver and the mortgagor, or against the receiver *(Leicester Permanent Building Society v Butt* [70]), could sue to enforce these duties … [T]he statutory duties of the receiver are owed only to the mortgagor and mortgagees so that no public taxing or rating authority could sue the receiver for damages if he failed to pay rates and taxes out of his receipts (*Yourell v Hibernian Bank Ltd.*; *Refuge Assurance Co. Ltd. v Pearlberg*; *Liverpool Corporation v Hope*).' Although the operation of section 254 was not considered in *Visbord*, the general legal point applies equally to all of the Commissioner's recovery power.

[18] Dal Pont, G E, 2001, Law of Agency, Butterworths, Australia, p.36; *Gosling v Gaskell & Grocott* [1897] AC 575 at 595, per Lord Davey.

Capital gains

28. An assessable capital gain is made in the year of income when the relevant CGT event happens. In almost all situations the gain is not made progressively over the period of ownership of the asset. This remains the legal position for a gain of a capital nature to which section 254 applies.

29. A CGT event happens to a debtor's CGT asset when a receiver, as agent of the debtor, disposes of the asset. We consider that a debtor who makes a capital gain on disposal of the asset makes an equivalent gain of a capital nature through the receiver's agency under paragraph 254(1)(a). Even if the asset vests in the receiver to enforce the creditor's security, that vesting is ignored under the CGT provisions and therefore for section 254 purposes.

Appendix 2 – Your comments

30. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

31. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**26 April 2019**
Contact officer:	**Anna Martin**
Email address:	**anna.martin@ato.gov.au**
Telephone:	**(02) 6216 6014**

References

Previous draft:

TD 2012/D7 (withdrawn)

Related Rulings/Determinations:

TD 2012/D6 (withdrawn)

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 254
- ITAA 1936 254(1)
- ITAA 1936 254(1)(a)
- ITAA 1936 254(1)(d)
- ITAA 1936 254(1)(e)
- ITAA 1997
- ITAA 1997 106-60
- Corporation Act 2001
- Corporations Act 2001 556
- Law of Property Act 1936 (SA)
- Property Law Act 1958 (Vic)

Case references:

- Commissioner of Taxation v. Australian Building Systems Pty Ltd (In liquidation) [2015] HCA 48; (2015) 257 CLR 544; 2015 ATC 20-548; (2015) 102 ATR 359
- Bell Group NV Ltd (In liquidation) v. DC of T [2015] FCA 1056; 2015 ATC 20-528
- Visbord v. Federal Commissioner of Taxation [1943] HCA 4; (1943) 68 CLR 354; [1943] ALR 153
- Gosling v. Gaskell & Grocott [1897] AC 575

Other references:

- Dal Pont, G E, 2001, Law of Agency, Butterworths, Australia

ATO references

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