TD 2021/5 - Income tax: a receiver's obligation to retain money for post-appointment tax liabilities under section 254 of the Income Tax Assessment Act 1936

This cover sheet is provided for information only. It does not form part of *TD 2021/5 - Income tax: a receiver's obligation to retain money for post-appointment tax liabilities under section 254 of the Income Tax Assessment Act 1936*

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

Generated on: 20 November 2026, 09:24:25 PM

Status: **legally binding**

Taxation Determination

Income tax: 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 Determination

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

Table of Contents **Paragraph**

What this Determination is about **1**
Ruling **2**
Example 1 – receiver disposes of capital asset 5
Example 2 – receiver continues trading 11
Date of effect **17**
Appendix – Explanation **18**

What this Determination is about

1. This Determination explains the Commissioner's view of a receiver's obligation to retain money under section 254 of the *Income Tax Assessment Act 1936* (ITAA 1936)[1] where the entity in receivership has an assessed post-appointment tax liability. It only applies to receivers appointed as agent for the entity in receivership.[2] It does not apply to court-appointed receivers.[3]

[1] All legislative references in this Determination are to the ITAA 1936 unless otherwise indicated.
[2] It does not apply to mortgagees in possession or their agents.
[3] A court-appointed receiver is an officer of the Court appointed to discharge the Court's instructions by obtaining valuations and effecting the sale of assets before applying the proceeds to debts as set out in the orders of the Court. The specific court orders determine in whose interests the receivers are acting.

Status: **legally binding**

Ruling

2. At times, income, profits or gains of a capital nature are derived by an entity through[4] 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[5] 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 come to the receiver in a lump sum.[6] The amount that the receiver must retain does not exceed the amount of the liability that the Commissioner can legally recover from the entity.[7]

Example 1 – receiver disposes of capital asset

5. *Kathleen's Kites Pty Ltd (Kathleen's Kites) purchased a capital asset in 2008.*

6. *In 2017, 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. *During the receivership, Dipika disposes of the capital asset and discharges Big Bank's secured debt from the sale proceeds. As a result of the disposal, Kathleen's Kites, not Dipika, makes a capital gain.*[8] *Kathleen's Kites' income tax liability relates to the whole of the capital gain. Kathleen's Kites has, through Dipika's agency, derived a gain of a capital nature. This gain satisfies the requirements in paragraph 254(1)(a). Therefore, any tax assessed on that gain enlivens the retention obligation in paragraph 254(1)(d).*

8. *Kathleen's Kites includes the capital gain in its income tax return and the tax payable on the gain is assessed to Kathleen's Kites. As agent, Dipika must retain from any monies that come to her as receiver, including the sale proceeds that remain after having repaid Big Bank's secured debts, enough money to pay the tax assessed. The amount Dipika must retain is limited to the amount of the assessed tax that the Commissioner can legally recover from Kathleen's Kites. The Commissioner does not have a legally-enforceable right to be paid the tax amount ahead of Big Bank Co and can only recover the assessed tax from any funds left after paying the secured creditor.*

9. *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. If the tax remains unpaid, the Commissioner may recover the debt from Dipika, to the extent of her personal liability.*

---

[4] Paragraph 254(1)(a) makes every agent and trustee answerable as taxpayer '… for the doing of all such things as are required …' by the tax laws for the income or any 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 of section 254(1).

[5] *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liquidation)* [2015] HCA 48 (*Australian Building Systems*).

[6] *Australian Building Systems* at [193].

[7] See paragraphs 21 to 24 of this Determination.

[8] This is true even if the asset vests in Dipika as receiver (section 106-60 of the *Income Tax Assessment Act 1997*).

Status: **legally binding**

10. *Dipika pays the amount of tax that the Commissioner is legally entitled to using the retained funds because paragraph 254(1)(a) makes her answerable as taxpayer for all things required to be done by the ITAA 1936 in respect of the capital gain, including the payment of tax.*

Example 2 – receiver continues trading

11. *Ben's Balloons Pty Ltd (Ben's Balloons) carries on a balloon manufacturing business. It has a loan facility from Big Bank Co secured by a fixed and floating charge over all of Ben's Balloons' assets. Ben's Balloons defaults on the loan at the beginning of the 2018 income year. As a result, Big Bank Co appoints Dipika as receiver and manager of the secured property. The deed of appointment specifies Dipika as agent for Ben's Balloons.*

12. *After her appointment, Dipika continues to trade on a 'business as usual' basis while seeking a purchaser for the business. Ben's Balloons makes trading profits during this time. Although Dipika, as receiver and manager, has management and control of Ben's Balloons' income, it is Ben's Balloons that derives the income, not Dipika. Ben's Balloons derives the income through Dipika's agency. Dipika then starts a wind-down phase in which she realises the vast majority of the company's stock, which was subject to Big Bank Co's security interest. A few months later, the creditors resolve that Ben's Balloons be wound up in insolvency and liquidators are appointed. By this time, Dipika has realised most of Ben's Balloons' assets and is in a position to retire as receiver and manager.*

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 are taken into account in calculating the company's taxable income, as are capital gains made on the sale of Ben's Balloons' assets. The Commissioner assesses the income tax payable on the taxable income. Dipika is obliged to retain (out of money that has 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.*

14. *Dipika discharges Big Bank Co's secured debts out of the proceeds she received from the disposal of Ben's Balloons' fixed assets. The trading proceeds and any remaining sale proceeds make up the surplus. It is out of this surplus, reduced by any other claims with priority over the unsecured tax debt[9], that Dipika must retain enough money to pay the amount of the assessed income tax.*

15. *Dipika is personally liable for the tax assessed on the trading profits and capital gains to the extent of any amount that she has retained, or should have retained, after having been assessed.[10] She is not otherwise personally liable for the tax. The Commissioner may seek to recover the tax debt from Dipika, to the extent of her personal liability, which is limited to the amount the Commissioner can legally recover from the entity. The Commissioner does not have a legally-enforceable right to be paid income tax ahead of Big Bank Co.*

16. *Dipika pays the amount of tax that the Commissioner is legally entitled to using the retained funds because paragraph 254(1)(a) makes her answerable as taxpayer for all things required to be done by the ITAA 1936, including the payment of tax.*

---

[9] For example, employee claims given priority by section 433 of the *Corporations Act 2001* (Corporations Act).
[10] Paragraph 254(1)(e).

Status: **legally binding**

Date of effect

17. This Determination applies to years of income commencing both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
19 May 2021

Status: **not legally binding**

Appendix – Explanation

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

Section 254

18. Subsection 254(1) imposes a number of obligations on every agent and trustee for any income or profits or gains of a capital nature 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 the Commissioner a means of collection against agents and trustees.[11]

19. Although tax law extends the definition of trustee to include a receiver[12] ,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. That will be determined by the terms of the security documentation under which the receiver is appointed and the relevant State and Commonwealth legislation.[13]

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

21. In *Australian Building Systems,* the High Court held that the retention obligation in paragraph 254(1)(d) does not arise until an assessment is made.[14]

22. 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 they cannot legally recover the full amount of the assessment. One such area concerns the interaction of the Corporations Act and tax liabilities.[15] 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.

23. In the case of a receiver, the question is to what extent (if any) is the Commissioner's right of collection constrained by other applicable laws such that the full amount of the assessment cannot legally be recovered?

24. For receivers, there is not a generally applicable provision equivalent to section 556 of the Corporations Act.[16] Consequently, tax liabilities incurred by a taxpayer after a receiver is appointed are simply unsecured debts with no greater priority to payment than

[11] *Australian Building Systems*, per Keane J at [104] and per Gordon J at [171].
[12] Definition of 'trustee' in subsection 6(1).
[13] See paragraphs 25 to 27 of this Determination.
[14] *Australian Building Systems*, per French CJ and Kiefel J at [39] and Gageler J at [58].
[15] In *Bell Group Limited (in liq) 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 s 556 of the Corporations Act'. Section 254 '… require[s] the liquidator to set aside amounts to meet expected tax debts, but leave[s] questions of payment and priority to the Corporations Act'.
[16] Section 556 of the Corporations Act 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.

any other unsecured debt. There may, however, be another statute[17], or agreement, providing the Commissioner with an enforceable legal right to require payment before unsecured creditors or even secured creditors. The facts and circumstances, relevant provisions and their interactions with the tax law, must therefore be carefully considered in each case.[18]

25. 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 the amount is zero, then there is no obligation to retain.

Agency

26. 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.

27. 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.[19]

28. 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.

Capital gains

29. A capital gain is made in the income year in which the relevant CGT event happens. The actions of a receiver, as agent of the debtor, can result in a CGT event in respect of a debtor's CGT asset. 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, and the debtor makes a gain of a capital nature through the receiver's agency.

---

[17] 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).

[18] 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:

> [i]t 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* (6)), 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.*(1); *Refuge Assurance Co. Ltd.* v. *Pearlberg* (2); *Liverpool Corporation* v. *Hope* (3)).'

Although the operation of section 254 was not considered in *Visbord*, the principle applies equally to the Commissioner's recovery power.

[19] Dal Pont, GE (2001) *Law of Agency*, Butterworths, Australia, p.36; *Gosling v. Gaskell* [1897] AC 575 at [595], per Lord Davey.

Status: **not legally binding**

References

Previous draft:

TD 2012/D7 (withdrawn); TD 2019/D2

Related Rulings/Determinations:

TD 2012/D6 (withdrawn)

Legislative references:

- 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 106-60
- Corporations Act 2001 433
- Corporations Act 2001 556
- Law of Property Act 1936 (SA) 53
- Property Law Act 1958 (Vic) 110

Cases relied on:

- Bell Group Ltd (in liq) v Deputy Commissioner of Taxation [2015] FCA 1056; 2015 ATC 20-528
- 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
- Gosling v Gaskell [1897] AC 575
- Visbord v Federal Commissioner of Taxation [1943] HCA 4; (1943) 68 CLR 354; [1943] ALR 153

Other references:

- Dal Pont, GE (2001) Law of Agency, Butterworths, Australia
- PS LA 2011/16
-

ATO references

NO:	1-9BXPE51
ISSN:	2205-6211
BSL:	
ATOlaw topic:	Administration ~~ Debt recovery Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events – general

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products.