Money, Money, Money – s.255 of the *Income Tax Assessment Act 1936*

Tax and Litigation Update

The Australian Taxation Office recently released a Decision Impact Statement regarding a decision of the Full Court of the Federal Court of Australia in *Federal Commissioner of Taxation v Resource Capital Fund IV LP & Ors* (2013) 215 FCR 1.

The case considered the interpretation of s.255 of the *Income Tax Assessment Act 1936* (Cth) and, in particular, how the term 'money' in that section should be interpreted.

The essential question to be answered was whether 'money' should be construed narrowly as referring only to Australian currency.

Two partnerships formed in the Cayman Islands, disposed of their shares in an Australian company (Talison) in consideration of amounts payable in Canadian currency.

Those amounts were paid into a Canadian bank account maintained by Talison which was acting as agent for the two partnerships for the purposes of collecting and distributing the sale proceeds.

The Commissioner assessed the two partnerships for income tax, and issued notices to Talison under s.255 requiring Talison to retain and subsequently pay to the Commissioner the sums payable by the two partnerships.

The two partnerships and Talison successfully challenged the notices at first instance. Edmonds J held that the notices did not oblige Talison to retain or pay to the Commissioner, or convert into Australian currency and then retain or pay to the Commissioner, any amount of Canadian currency.

The Commissioner appealed successfully to the Full Court.

Who does this affect?

- Persons in control of money from non-residents
- Non-residents with Australian business interests
- Tax agents

Article Highlights

- Full Court confirms that reference to 'money' in s.255(1)(b) of the *ITAA 1936* is not confined to Australian currency, but extends to any foreign currency.
- Recognition that s.255 should not be interpreted as requiring a non-resident's tax liability to be paid from the same funds as those required to be retained by the controller.
- Amount required to be retained by the controller should be calculated by reference to the exchange rate at the time the s.255 notice is issued.
- Liability of the controller is limited to that amount, regardless of exchange rate fluctuations.

Section 255(1) relevantly provides:

> *"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; …"*

The Full Court unanimously held that the reference to 'money' in s. 255 includes a debt which the recipient of the notice owes to a non-resident taxpayer, whether the debt is denominated in Australian dollars or a foreign currency. Accordingly, the s.255 notices were valid.

Applying *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598, Gordon J at [20] described the practical operation of s.255:

> *"As the Court explained in Bluebottle at [75] – [78], s.255(1)(a) and (b) concern different matters. Section 255(1)(a) obliges the person who has "the receipt control or disposal of money belonging to a non-resident" (defined by that court as the "controller") … "when required by the Commissioner [to] pay the tax due and payable by the non-resident": at [75] ... Section 255(1)(a) concerns payment of tax. The amount dealt with by s 255(1)(a) (by payment) is readily ascertained. It is the amount of tax due and payable by the non-resident. Section 255(1)(b) has a different role. It gives the controller authority to retain (and requires the controller to retain) out of any money "so much as is sufficient to pay the tax which is or will become due by the non-resident": at [75] Section 255(1)(b) concerns retention of money belonging to a non-resident which is money of which the controller has the receipt control or disposal."*

Her Honour then went on to say at [45]:

> *"Nothing in the text or context of s.255 suggests that the phrase all money due does not extend to debts due by the controller to the non-resident if those debts are denominated in foreign currency... Indeed, if s.255 was so limited, the resulting operation of the*

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> *provision would be impractical, if not absurd... The operation of the provision would depend upon the currency which the controller and the non-resident taxpayer had chosen as the money of account between them."*

Allowing the Commissioner's appeal, the Court held that, if the money which is to be retained is in a foreign currency, the controller is obliged and authorised to retain so much of that foreign currency as is sufficient to satisfy the tax liability of the non-resident.

Interestingly, and perhaps to the Commissioner's detriment in the future, the Court stated that the amount which is required to be retained by the controller should be calculated by reference to the exchange rate at that time of issue of the s.255 notice.

The Court specifically noted that the liability of the controller is limited to the extent of the amount required to be retained by the controller. Accordingly, if, after the funds have been properly retained by the controller, the exchange rate fluctuates in such a way that the retained funds are insufficient to satisfy the tax liability of the non-resident, the controller is not personally liable to account for the difference.

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