

TD 2021/5EC - Compendium

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Public advice and guidance compendium – TD 2021/5

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination 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?* It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

| Issue number | Issue raised | ATO response |
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| 1 | Is the Commissioner saying that no obligation arises under section 254 of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) on court-appointed receivers as no agency relationship exists? | Paragraph 1 of the final Determination has been amended to clarify that court-appointed receivers are not within the scope of this Determination. The application of the law in those circumstances will depend on the court orders. Paragraph 27 from the draft Determination has been deleted. |
| 2 | Once an assessment is raised and the retention obligation under paragraph 254(1)(d) of the ITAA 1936 enlivened, does that mean that the receiver cannot pay the secured creditor the proceeds of sale or any trading receipts before the Commissioner's debt is met? | The final Determination explains that tax liabilities incurred by a taxpayer after a receiver is appointed are generally unsecured debts with no greater priority to payment than any other unsecured debt, subject to any statute or agreement providing the Commissioner an enforceable legal right to require payment before other creditors. See paragraphs 23 and 24 of the final Determination. |
| 3 | Is the Commissioner suggesting that if the receiver trades and pays expenses and subsequently receives an assessment, the money dealt with before the assessment is issued could also be subject to the retention obligation? | No. The final Determination states that there is no retention obligation under section 254 of the ITAA 1936 until an assessment has issued, as per <i>Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liquidation)</i> [2015] HCA 48 (<i>Australian Building Systems</i>). |

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| 4 | <p>In the context of liquidators, the High Court in <i>Bruton Holdings Pty Ltd (in liquidation) v Commissioner of Taxation</i> [2009] HCA 32 (<i>Bruton Holdings</i>) found that the more specific provision for liquidators in section 260-45 of Schedule 1 to the <i>Taxation Administration Act 1953</i> (TAA) prevailed over the more general provision in section 260-5 of Schedule 1 to the TAA.</p> <p>For receivers, is there a conflict between subsection 260-75(5) of Schedule 1 to the TAA and paragraph 254(1)(d) of the ITAA 1936 in relation to the proceeds of sale of secured assets?</p> <ul style="list-style-type: none"> • Subsection 260-75(5) of Schedule 1 to the TAA permits the receiver to part with assets after his or her appointment to enforce a security such as a mortgage or charge. • Paragraph 254(1)(d) of the ITAA 1936 does not. <p>Does the High Court's decision in <i>Bruton Holdings</i> suggest that subsection 260-75(5) of Schedule 1 to the TAA should prevail over paragraph 254(1)(d) of the ITAA 1936 in relation to receivers selling assets to enforce securities or trading on?</p> | <p>Consideration of the <i>Bruton Holdings</i> decision is beyond the scope of this Determination as it dealt with the validity of section 260-5 of Schedule 1 to the TAA notices in particular (different) circumstances, rather than receiver's obligations.</p> <p>The final Determination has been edited to clarify that a receiver will generally be entitled to pay secured creditors before retaining an amount for payment of tax (subject to specific legislation or agreements).</p> |
| 5 | <p>We suggest that a greater range of scenarios should be provided to give clarity on the interaction of the status of the ATO as against secured creditors and situations where assessments have, and have not, been made prior to funds being distributed. It would also be useful to cover the situation where an assessment is rendered and there are no longer any funds available for the receiver to retain (for example, where funds have been distributed to priority creditors such as employees and the secured creditor).</p> | <p>The final Determination makes it clear that there is no retention obligation under section 254 of the ITAA 1936 until an assessment has been issued.</p> <p>The final Determination has been changed to clarify that a receiver will generally be entitled to pay secured creditors before retaining an amount for payment of tax (subject to specific legislation or agreements).</p> <p>The Determination cannot address all possible scenarios. If a receiver is unsure of its obligations in a particular circumstance, they may apply for a private ruling.</p> |

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| 6 | <p>The receiver's role is not generally to distribute funds to ordinary unsecured creditors (which the Commissioner will be). Could the Determination advise what the receiver is required to do with the funds retained?</p> <p>A receiver cannot unnecessarily prolong the receivership whilst retaining funds on behalf of the ATO. Ordinarily if funds were remaining on the conclusion of a receivership, those funds would be transferred to another external administrator (for example, liquidator) if one is acting, or where no other external administrator has been appointed, the funds would be transferred back to the company.</p> | <p>The receiver can pay the tax with the retained funds because paragraph 254(1)(a) of the ITAA 1936 makes them answerable as taxpayer for all things required to be done by the tax law. This has been included in the examples in the final Determination.</p> |
| 7 | <p>We suggest that it would be useful and provide greater clarity to include the Appendix when the draft Determination is finalised.</p> | <p>The Ruling section is the legally-binding part of the Determination; the Appendix (containing the Explanation section) does not form part of the legally-binding public ruling but it will be published in the final Determination.</p> |
| 8 | <p>The second sentence in paragraph 28 of the draft Determination regarding capital gains states that '[i]n almost all situations the gain is not made progressively over the period of ownership ...'. In what circumstances is a capital gain made progressively over the period of ownership?</p> | <p>The sentence referred to has been deleted from the final Determination. A capital gain is made as determined by tax law.</p> |
| 9 | <p>The analysis set out at paragraphs 20 to 23 of the draft Determination must be correct, otherwise the situation would arise where the receiver is left with a 'residual' personal liability under paragraph 254(1)(e) of the ITAA 1936 for the tax liability of the principal which the Commissioner cannot collect because of priority issues.</p> | <p>Noted. No change required.</p> |

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| 10 | <p>The most difficult aspects of a receiver's retention obligation are dealt with in paragraphs 19 to 23 of the Determination (in particular, the fact that section 254 of the ITAA 1936 does not require a receiver to retain funds prior to an assessment being issued, which is particularly problematic for capital gains).</p> <p>It is understandable that the Commissioner cannot deal with these aspects in the binding ruling section as it will depend on the particular statute and security agreements.</p> | Noted. No change required. |
| 11 | <p>It seems to be implicit that the Commissioner accepts that a receiver will generally be entitled to pay secured creditors before retaining an amount, if any is left.</p> <p>It is less clear whether a receiver can pay unsecured creditors or a liquidator before an assessment is issued.</p> | <p>The examples have been changed in the final Determination so that it is explicit (rather than implicit) that a receiver will generally be entitled to pay secured creditors before retaining an amount for payment of tax.</p> <p>The High Court in <i>Australian Building Systems</i> has decided that there is no obligation to retain for tax under section 254 of the ITAA 1936 until an assessment is issued.</p> |
| 12 | <p>Will the Commissioner be issuing special assessments to preserve the ability to collect tax from a company in liquidation? In practice this may be more of an issue for liquidators because receivers will generally only distribute amounts to secured creditors or pay debts which arise during the receivership.</p> | <p>This issue is beyond the scope of this Determination because it is about how the Commissioner administers the tax law generally rather than a receiver's retention obligation.</p> <p>Paragraph 254(1)(b) of the ITAA 1936 authorises the Commissioner to assess agents and trustees on the income, or profits or gains referred to in paragraph 254(1)(a) of the ITAA 1936 in their representative capacity only. This power may be used to preserve the ability to collect a company's tax from a receiver (or liquidator).</p> |
| 13 | <p>Section 254 of the ITAA 1936 applies to all agents and trustees (except for a mortgagee in possession). Can the Determination be extended beyond receivers to liquidators also?</p> | <p>This Determination finalises Draft TD 2019/D2 which is specifically about receiver's obligations.</p> |

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| 14 | In addition to citing <i>Australian Building Systems</i> , should the Determination discuss <i>Bluebottle UK Limited v Deputy Commissioner of Taxation</i> [2007] HCA 54 (<i>Bluebottle</i>)? | It is not necessary for this Determination. In <i>Bluebottle</i> , the court interpreted section 255 of the ITAA 1936. The discussion of the applicability of that interpretation to section 254 of the ITAA 1936 provided in <i>Australian Building Systems</i> is detailed and provides the appropriate basis for interpreting section 254 of the ITAA 1936. The decision does not need to be reproduced in this Determination. Section 255 of the ITAA 1936 does not need to be discussed. |
| 15 | What are the implications of the High Court's interpretation of section 254 of the ITAA 1936 for trustees in bankruptcy? | This is beyond the scope of this Determination. |
| 16 | Given the obligation under section 254 of the ITAA 1936 to retain amounts for tax only arises once an assessment has been issued, on whom does the obligation to lodge a tax return fall (the company or the receiver/controller)? When is it required to be lodged? | <p>These issues are beyond the scope of this Determination.</p> <p>However, note:</p> <ul style="list-style-type: none"> • the appointment of a receiver or controller does not displace the directors or affect the legal personality of the company • the Commissioner may assess an entity's tax liability without an income tax return being lodged. |