IT 2544W - Income tax: application of section 254 and 255

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Notice of Withdrawal

Taxation Ruling

Income tax: application of section 254 and 255

Taxation Ruling IT 2544 is withdrawn with effect from today.

1. Taxation Ruling IT 2544 is about the application of sections 254 and 255 of the *Income Tax Assessment Act 1936* (ITAA 1936). Section 255 can operate where a non-resident derives income, or profits or gains of a capital nature, from sources in Australia or where a non-resident 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. When the Commissioner of Taxation gives a notice under section 255 to a person having the receipt, control or disposal of money belonging to the non-resident, the section requires that person to retain from that money so much as is sufficient to pay the tax that is or will become due by the non-resident; and when required by the Commissioner to pay the tax due and payable by the non-resident. Paragraph 6 of IT 2544 stated that the Commissioner considered that the correct interpretation of the section is that paragraph 255(1)(b) can have effect before an assessment has issued and that it operates of its own force without requiring any notification from the Commissioner. That is, the section empowered the Commissioner to give a notice to a person requiring them to retain moneys belonging to a non-resident before the Commissioner had issued an assessment to the non-resident. At paragraph 13 of IT 2544 the Commissioner stated that he would not regard a person as being required to retain moneys for the payment of a non-resident's tax under section 255 unless he had notified the person, whether before or after assessment of the non-resident, to retain a certain amount or percentage of the moneys belonging to the non-resident.

2. In *Bluebottle UK Ltd & ors v Deputy Commissioner of Taxation & anor* (2007) 232 CLR 598, [2007] HCA 54 (*Bluebottle*) the High Court held that the phrase 'tax which is or will become due' in paragraph 255(1)(b) of the ITAA 1936 was a reference to an ascertained amount of tax that had been assessed, even though it might not yet be due for payment. Section 255 of the ITAA 1936 does not operate before an assessment of the non-resident has been made.

3. IT 2544 also stated at paragraph 18 that paragraph 254(1)(d) of the ITAA 1936 (which applies to agents and trustees) is in similar terms to paragraph 255(1)(b) of the ITAA 1936, and the view was taken that paragraph 254(1)(d) of the ITAA 1936 may also operate before an assessment of tax is made. In *Bluebottle* the High Court observed of section 52 of the *Income Tax Assessment Act 1915* (ITAA 1915) – a precursor to section 254 of the ITAA 1936 in similar terms; although unlike paragraph 52(f) of the ITAA 1915, paragraph 254(1)(e) of the ITAA 1936 does not require lodgment of a return for the personal liability of the agent or trustee for tax to arise – that the context in which the requirement to retain money in paragraph 52(e) of the ITAA 1915 appeared is radically different from that provided by section 255 of the ITAA 1936, as the section applied to agents and trustees and made them answerable as taxpayer. *Bluebottle* did not decide that section 254 of the ITAA 1936 only operated when an assessment had been made.

4. As IT 2544 is not consistent with the decision of the High Court in *Bluebottle* it is withdrawn.

Commissioner of Taxation
23 June 2010

ATO references

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