

TD 2012/D6W - Withdrawal - Income tax: must income tax have been assessed before an agent or trustee has an obligation under section 254 of the Income Tax Assessment Act 1936 to retain sufficient money to pay tax which is or will become due as a result of their agency or trusteeship?

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Notice of Withdrawal

Draft Taxation Determination

Income tax: must income tax have been assessed before an agent or trustee has an obligation under section 254 of the *Income Tax Assessment Act 1936* to retain sufficient money to pay tax which is or will become due as a result of their agency or trusteeship?

Draft Taxation Determination TD 2012/D6 is withdrawn with effect from today.

1. The Draft Determination concluded the phrase 'tax which is or will become due' in paragraph 254(1)(d) of the *Income Tax Assessment Act 1936* (ITAA 1936) is not restricted to tax that has been assessed, and includes tax that will become due when an assessment is made. Consequently, the obligation to retain an amount under paragraph 254(1)(d) can arise in respect of tax that has not yet been assessed.
2. The Draft Determination is being withdrawn following the decision of the High Court in *Commissioner of Taxation v. Australian Building Systems Pty Ltd (in liquidation)*; *Commissioner of Taxation v. Muller* [2015] HCA 48. In this case, a majority of the High Court found that the obligation to retain money to pay tax which is or will become due in respect of income, profits or gains under paragraph 254(1)(d) of the ITAA 1936 only applies if an assessment has been issued in respect of the income, profits or gains.
3. This means that a trustee or agent will have no obligation to retain money to pay tax under paragraph 254(1)(d) of the ITAA 1936 until an assessment has been issued in respect of the relevant income, profits or gains.

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ATO references

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