

ATO RECEIVABLES POLICY

PART B The Collection of Taxation Debts

Chapter 20 VOLUNTARY ADMINISTRATION

The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.

Date of effect: 24 July 2008 (This version replaces the 2006 version.)

Key legislation: *Corporations Act 2001*

PURPOSE

1. This chapter deals with the factors that the Tax Office will consider in deciding how to vote on a proposal presented to creditors by the administrator of a company under voluntary administration.

INTRODUCTION

2. Part 5.3A of the *Corporations Act 2001* provides an opportunity for insolvent companies to reach an arrangement with their creditors which addresses the creditors' debts and enables the company to continue trading. As it is not always possible for the company to continue, the Part also seeks to provide for the business, property and affairs of an insolvent company to be administered in a way that results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

POLICY

3. The Tax Office recognises that the voluntary administration process can achieve beneficial outcomes. These can be summarised as follows:
 - (i) it avoids a sudden winding up of the company – a process which often results in only a nominal (or nil) return to creditors
 - (ii) it preserves a business which, despite having its operations threatened by adverse circumstances, is fundamentally viable
 - (iii) it provides an opportunity to reorganize a company's affairs, with a view to enhancing the position of its creditors, shareholders and directors, and
 - (iv) it potentially provides a better return for the revenue.
4. Accordingly, while each case must be considered on its individual merits, it can be accepted that the Tax Office will generally support proposed deeds which have no adverse features and which are expected to provide the Commonwealth with a greater proportion of the provable debt within a reasonable period than would be received under liquidation.

5. The Commissioner may seek external professional advice to assist in the collection and analysis of material relevant to such decisions.
6. In deciding whether to vote for or against a proposed deed, the Tax Office will have regard to all relevant matters, including, but not limited to:
 - (i) the tangible benefit to the Commonwealth revenue that is expected to be gained from any proposed arrangement
 - (ii) the likelihood that the undertakings in the proposal would be achieved
 - (iii) the contents and comprehensiveness of relevant reports
 - (iv) the anticipated future income
 - (v) the fact that the investigative and other powers available to an administrator are not as extensive as those available to a liquidator
 - (vi) any legal advice which may have been obtained by the Tax Office
 - (vii) any association between the debtor and other creditors, including an association which only arose pursuant to an assignment of debt
 - (viii) the debtor's taxation compliance history and the compliance history of related parties or entities
 - (ix) the extent and seriousness of any taxation offences which may have been committed
 - (x) any particular aspect of the proposed deed which is considered to be unfairly prejudicial, oppressive or discriminatory (such as, for example, rankings within and between the various creditors for the purpose of receiving proposed dividends, or a term that seeks to absolve directors from any personal liabilities).
7. The Tax Office will not withdraw or stay any action against a director where the terms of a deed purport to limit the Commissioner's rights to do, or refrain from doing, some action. Such terms are ineffectual and the Tax Office will vote against any deed which includes such a clause.
8. Although the Commissioner acknowledges that, as a creditor, he is bound by deeds of company arrangement, he will nevertheless seek appropriate relief through the courts where an arrangement appears to unreasonably disadvantage the Commonwealth revenue or contain other adverse features.

Provision of information to administrator

9. The Commissioner may choose to provide information about the debtor to an administrator of the company or an administrator of the deed where the Commissioner believes that it is reasonably likely that the provision of such information will lead to the Commissioner receiving a greater dividend or distribution from the insolvency process. Before disclosing any information, the Tax Office decision-maker will have due regard to the relevant secrecy provisions in the *Taxation Administration Act 1953* and the *Income Tax Assessment Act 1936*. The decision will also be guided by Chapter 2 'Accountability and review of decisions.'

Garnishees and administrators

10. A garnishee notice will not generally be withdrawn, simply because an administrator has been appointed. The law clearly states that the service of a valid garnishee notice creates an immediate charge over any funds (to the extent detailed in the notice) due by the garnishee recipient to the debtor company. A charge created

over funds due to the debtor company prior to the appointment of an administrator (even where the debt is not payable until after the date of appointment) is a valid charge and must be paid to the Tax Office by the third party when the debt becomes payable. The third party is under a legal obligation to comply with the garnishee notice and must do so despite the appointment of the administrator.

11. Once an administrator has been appointed, the Tax Office will not issue a garnishee notice in respect of the company's pre-appointment tax liabilities unless it is necessary to protect the Commissioner's position having regard to the circumstances of the particular case. If a garnishee is issued in those circumstances, the charge so created is not enforceable while the company remains in administration (that is, not until the execution of a deed of company arrangement or until the company is returned to the directors). However, if the company proceeds to be wound up, the charge so created will be void.

TERMS USED

Committee of inspection – is a representative body of the creditors of a company liquidation. The Committee may guide the liquidator regarding the interests and preferences of the general body of creditors.

Insolvent – is defined at section 95A of the *Corporations Act 2001*, as follows:

- *'A person is solvent if and only if, the person is able to pay all the person's debts, as and when they become due and payable'.*
- *'A person who is not solvent is insolvent'.*

Chapter 20 - Archived version

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