

**Part B      The Collection of Taxation Debts****31           CLEARANCES - OBLIGATIONS OF TRUSTEES AND THE COMMISSIONER**

*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: 4 July 2006** *(This replaces the 2003 version.)*

**31.1        PURPOSE**

31.1.1      This chapter deals with:

- the obligations of trustees to notify the Commissioner of their appointment and to set aside an amount to pay tax-related liabilities;
- the Commissioner's obligations to advise the trustees of the amount of tax-related liabilities; and
- the priority afforded to costs incurred by the Commissioner as applicant creditor in a Court winding up.

**31.2        LEGISLATION**

31.2.1      Before 1 July 2000, there were specific sections under the various Acts administered by the Commissioner that set out the obligations of liquidators, receivers and certain agents and the obligations of the Commissioner when notified of the appointment. These sections were:

- section 215 *Income Tax Assessment Act 1936* (ITAA 1936);
- section 96 *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986);
- section 123 *Sales Tax Assessment Act 1992* (STAA 1992);
- section 53 *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992).

From 1 July 2000, the following provisions of the *Taxation Administration Act 1953* (TAA) set out those obligations:

- section 260-45 (for liquidators)
- section 260-75 (for receivers)
- section 260-105 (for agents winding up a business for a non-resident principal)

The provisions of the TAA above apply to trustees appointed on or after 1 July 2000 (whether the tax-related liabilities concerned arise before, on or after that date).

However, section 260-45 does not apply in relation to a priority debt for Superannuation Guarantee Charge. Such debts are given priority in a liquidation in accordance with section 52 of the SGAA 1992. Section 260-

45 does apply to non-priority Superannuation Guarantee Charge debts, which include General Interest Charge (GIC).

### **31.3 INTRODUCTION**

- 31.3.1 Trustees are required to notify the Commissioner within 14 days of:
- (i) their appointment as a liquidator; or
  - (ii) their taking possession of the assets of a company as a receiver; or
  - (iii) receiving instructions from a non-resident principal to wind up a business of the principal.
- 31.3.2 As soon as practicable after being notified of the appointment, or of a trustee taking possession of assets, the Commissioner is obliged to provide the trustee with advice of the amount which would be sufficient to meet any tax-related liabilities that are, or will become, payable (including additional charges for late payment/ GIC).
- 31.3.3 While a liquidator or receiver is entitled to part with assets in order to pay secured or priority debts at any time, neither can, without leave of the Commissioner, part with any of the assets of the company to pay ordinary debts (that is, unsecured debts) until the Commissioner provides the notification required. However, an agent for a non-resident principal cannot part with any assets to pay secured or priority debts until receiving notice of the likely debt from the Commissioner and setting aside an amount to meet that debt.
- 31.3.4 After receipt of the Commissioner's notification, the trustee (unless they are an agent for a non resident as described above) is only required to set aside sufficient assets to pay a pro-rata share of the tax-related liabilities when that debt is compared to the total amount of ordinary debts. The Commissioner may subsequently vary the notification to increase the amount. However, if the trustee has paid the debt notified by the Commissioner and distributed the assets, the obligations imposed on the trustee will have been met and a personal liability avoided. This situation may be different if the trustee knew, or had the means of knowing, the Commissioner's estimate was wrong.
- 31.3.5 Where a trustee fails to comply with any provision or pay the tax-related liabilities for which the trustee is liable, the trustee becomes personally liable to pay the debt notified, but only to the extent of the assets that the trustee was required to set aside. The trustee is also guilty of an offence which is punishable on conviction by a fine not exceeding 10 penalty units.

### **31.4 POLICY**

#### **General**

- 31.4.1 The obligations contained in sections 260-45 (liquidator), 260-75 (receiver) and 260-105 (agent) of the TAA provide a dual service to the Tax Office by way of notification of appointment and by requiring the setting aside of assets to meet unpaid tax debts.
- 31.4.2 The Commissioner will respond in a timely manner to any notification received from a trustee by advising of the amount of unpaid tax-related liabilities that are due. If the proper amount due has not been ascertained at the time of notification, then appropriate action will be taken as soon as

possible to determine the correct debt due to the Commissioner. The trustee should be notified of any delay that might arise in providing the relevant information.

- 31.4.3 Where it is not possible to determine the amount of a debt (for whatever reason) and the Commissioner is not prepared to raise a default assessment (if appropriate) or issue an estimate notice in relation to an unremitted amount, the trustee will be advised there is no amount to be set aside.

#### **Consolidated groups**

- 31.4.4 If a company in liquidation is, or has been, a member of a consolidated group, the Commissioner will include in the notification required to be given to the liquidator under subsection 260-45(3) of the TAA any liability the company has incurred as head company or as a contributing member under the joint and several liability and tax sharing agreement liability provisions in Division 721 of the *Income Tax Assessment Act 1997*.
- 31.4.5 Situations may arise where it may not be possible to immediately determine if a contributing member will become subject to a liability under Division 721 as the due date of the liability (being the head company's due time) is at some point in the future. In these circumstances, a subsection 260-45(3) notice will not be provided until the Commissioner is satisfied that all liabilities to which the company *may* be exposed have been established or otherwise forms the view that no other liabilities will arise.

### **31.5 NOTIFICATION OF LIABILITIES**

- 31.5.1 Where there is more than one type of tax-related liability that is to be notified in satisfaction of the requirements of a section of the TAA, a single notice showing each separate amount of tax-related liability will be sent to the trustee.

### **31.6 COSTS OF WINDING UP PROCEEDINGS**

- 31.6.1 In the winding up of a company that results from the order of a Court, the costs associated with the application for the order are ranked second in priority, only after the expenses of the liquidator '...in preserving, realising or getting in property of the company, or in carrying on the company's business;' (see section 556(1) of the *Corporations Act 2001*).
- 31.6.2 It would not be appropriate that payment be made other than in accordance with the ranking as provided by law. Where the Commissioner has an entitlement as the applicant creditor, any request to stand aside to permit payment of other debts or claims against the company, including the remuneration of the liquidator, will be declined.

### **31.7 TERMS USED**

- 31.7.1 'contributing member' is an entity that was a subsidiary member of a group for at least part of the period to which the group liability relates.
- 31.7.2 'head company's due time' is the time a group liability becomes due and payable by the head company.
- 31.7.3 A 'trustee', for the purposes of this chapter, may be either:
- a liquidator of any company being wound up; or

- a receiver for a debenture holder, who has taken possession of an assets of a company; or
- an agent for a non-resident principal, who has been instructed by the principal to wind up a business of the principal.

31.7.4 'Tax-related liability' or 'liability' is a term used to define any pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). It thus encompasses all types of taxes, penalties, additional charges for late payment, etc (including amounts previously defined under the *Income Tax Assessment Act 1936* (ITAA 1936) as "tax" and under the *Superannuation Guarantee Administration Act 1992* (SGAA 1992) as "superannuation guarantee charge" etc).