IT 2353 - Income Tax : effect of company dissolutions on taxation disputes

TAXATION RULING NO. IT 2353

INCOME TAX : EFFECT OF COMPANY DISSOLUTIONS ON TAXATION DISPUTES

F.O.I. EMBARGO: May be released

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I 1210025	COMPANY DISSOLUTIONS EFFECT ON OBJECTIONS/ REQUESTS FOR REFERENCE/ APPEALS	185 186 187 COMPANIES CODE, ADMINISTRATIVE APPEALS TRIBUNAL ACT TAXATION ADMINISTRATION ACT 1953

PREAMBLE The purpose of this Ruling is to consider the effect of company dissolutions on objections lodged by companies against income tax assessments and on appeal proceedings instituted by those companies under the provisions of Part V of the Income Tax Assessment Act ("ITAA").

Circumstances in which companies are dissolved

2. In a winding up by a court the liquidator under section 381 of the Companies Act 1981 (as applied by the Companies (Application of Laws) Act 1981 and 1982 in each of the participating States) - hereafter referred to as the "Companies Code" or the "Code" - may apply to the court for an order that he be released and that the company be dissolved. When such an order is made the company is dissolved from the date of the order (sub-section 382(6), Code).

3. In a voluntary winding up, after the affairs of the company are fully wound up and after the liquidator has presented to a company meeting or creditors' meeting an account of the winding up and filed with the National Companies and Securities Commission ("NCSC") a return of the holding of the meeting and an attached copy of the liquidator's account, the company is dissolved on the expiration of 3 months after the lodging of the return with the NCSC (sub-section 411(5), Code). Within that period of 3 months, the Supreme Court of a State or Territory may, on application by the liquidator or by an interested party, by order declare that sub-section 411(5) of the Code does not apply and instead specify the date on which the company is to be dissolved. When such an order is made the company is dissolved on the date specified in the order (sub-section 411(6), Code).

4. Where the NCSC has reasonable cause to believe that a company is not carrying on business or is not in operation, the NCSC may, in accordance with section 459 of the Code, cancel the registration of the company and the company will be dissolved (sub-section 459(2), Code). Similarly, where a company is being wound up and the NCSC has reasonable cause to believe that -

(a) no liquidator is acting;

(b) the affairs of the company are fully wound up and for a period of 6 months the liquidator has been in default in lodging any return required to be made by him; or

(c) the affairs of the company have been fully wound up by the court and there is no property or the available property is insufficient to pay the costs of obtaining a court order dissolving the company,

the NCSC may, in accordance with sub-sections 459(3) and 459(4) of the Code, cancel the registration of the company and the company will be dissolved.

5. A company may also be dissolved, without winding up, as part of a court approved scheme of compromise or arrangement for the reconstruction or amalgamation of companies (sub-section 317(1), Code).

Consequences of dissolution

6. The making of a winding up order does not terminate the existence of a company as a corporate entity. It continues to exist until it is dissolved. On dissolution, the company ceases to be a legal person and proceedings instituted by it or on its behalf or against it before dissolution cannot be continued and no new proceedings can be instituted : Principles of Company Law by H.A.J. Ford 4th ed. pp.681 and 683-684.

Reinstatement of dissolved companies

7. The Supreme Court of a State or Territory has power under sub-section 458(1) of the Code to make an order declaring void the dissolution of a company effected under sub-section 382(6) or 411(5) of the Code, i.e. otherwise than by cancellation of its registration. An application under sub-section 458(1) may be made either by the liquidator of the company or by any other person who appears to the court to be interested. The court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been dissolved.

8. Similarly, a Supreme Court has power under sub-section 459(6) of the Code to order the reinstatement of the registration of a company whose registration has been cancelled. It may do this within 15 years after the

cancellation on the application of any person aggrieved by the cancellation if it is satisfied that the company was, at the time of cancellation, carrying on business or in operation or it is otherwise satisfied that it is just that the registration be reinstated. The company is deemed to have continued in existence as if its registration had not been cancelled and the court again may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly may be as if the registration had not been cancelled (sub-section 459(6), Code). The 15 year limitation could be enlarged in a proper case by court order under paragraph 539(4)(d) of the Code.

9. The NCSC has limited power to reinstate the registration of a company whose registration has been cancelled. This power exists where the NCSC is satisfied that the cancellation resulted from an error on its part (sub-section 459(5), Code). On reinstatement, the company is deemed to have continued in existence as if its registration had not been cancelled.

RULING

10. The effect of the dissolution of a company on taxation objections or appeal proceedings depends, as the following different situations illustrate, on when the dissolution occurs in relation to the progress reached in the taxation dispute process.

Dissolution after assessment but before objection

11. Any objection purportedly lodged under section 185 of the ITAA by or on behalf of a company that has been dissolved is to be treated as invalid. Because the company ceased to exist on dissolution, there is no legal person - and thus no taxpayer - who may be dissatisfied with an assessment or who may lodge with the Commissioner any objection against the assessment.

12. If a dissolved company is reinstated under sub-section 458(1) or section 459 of the Code, whether the reinstated company may lodge a valid objection under section 185 of the ITAA against an assessment will depend on :

(i) whether the statutory 60 day period in section 185 has expired;

(ii) whether an application has been, or is to be, made to the Commissioner under sub-section 188(1) for extended time for lodging the objection and the final outcome of that application; and

(iii) what (if any) order is made by the court under sub-section 458(1) or sub-section 459(6) of the Code to place the company, the Commissioner and all other persons in the same position as nearly as may be as if the company had not been dissolved or had its registration cancelled.

Dissolution after objection but before the Commissioner's

decision on the objection

13. Although on dissolution a company ceases to exist as a legal person and is unable to institute new legal proceedings, if the company did exist at the time it lodged its objection with the Commissioner and if the objection otherwise satisfies the requirements of section 185 of the ITAA, it remains a valid objection even though the company may have been dissolved after the objection was lodged. The Commissioner is required by section 186 to consider the objection and, within a reasonable time, to either disallow it or allow it either wholly or in part : Re O'Reilly; Ex Parte Australena Investments Pty Ltd & Ors 83 ATC 4807; (1983) 15 ATR 162. The objection should therefore be determined in this situation in the ordinary course of events.

14. The Commissioner is also required by section 186, however, to serve the taxpayer by post or otherwise with written notice of his decision. In the absence of a reinstatement of the dissolved company, there is no taxpayer in existence on whom the Commissioner may serve the written notice of the decision.

15. In such cases an attempt should be made to communicate in writing with the person who, on the former company's behalf, lodged the objection explaining that the objection has been determined but that the Commissioner is unable to formally serve on any person written notice of his decision on the objection. It should be clearly stated that the written communication is not intended to constitute service of written notice of the decision. Nor should it be construed as service of written notice of the decision. The person should be further advised that, in the absence of a reinstatement of the company, it - being a dissolved company - has lost any further right under section 187 of the ITAA to seek judicial review of the decision by the Administrative Appeals Tribunal or to appeal to a Supreme Court.

16. If the dissolved company is reinstated before a decision is made on the objection, the objection should be considered, as required by section 186, and written notice of the decision should be served on the reinstated company. If the dissolved company is reinstated after a decision has been made on the objection, the obligation under section 186 to serve notice of the decision on the reinstated company would need to be complied with. It would then be able to pursue, if it wishes, its rights under section 187.

Dissolution after service of notice of decision on objection but before reference or appeal

17. Any reference or appeal in this situation purportedly requested under section 187 is to be regarded as invalid because, in the absence of reinstatement of the dissolved company, there is no taxpayer who may be dissatisfied with the decision on the objection or who may request reference or appeal. A letter should be sent to the person who lodged the purported request for reference or appeal stating that, and explaining why, the request is invalid. If any statutory appeal

fee had been lodged (under the former sub-section 188(1)) it should be refunded.

18. If the dissolved company is subsequently reinstated, whether it may validly request a reference to the Administrative Appeals Tribunal or appeal to a court will depend on :

(i) whether the statutory 60 day period in section 187 has expired;

(ii) whether an application has been, or is to be, made to the Commissioner under sub-section 188(2) for extended time for lodging a request for reference or appeal to the court and the final outcome of that application; and

(iii) what (if any) order is made by the court under sub-section 458(1) or sub-section 459(6) of the Code to place the company, the Commissioner and all other persons in the same position as nearly as may be as if the company had not been dissolved or had its registration cancelled.

Dissolution after request for reference or appeal but before transmission

19. Where a valid request for reference or appeal has been lodged and the company on dissolution ceases to exist before transmission of the company's reference or appeal to the appropriate tribunal, the Commissioner is nevertheless obliged by section 188 of the ITAA to refer the matter on. The reference or appeal should therefore be sent to the Administrative Appeals Tribunal or the court as appropriate.

20. In these circumstances a letter should be sent to the person who, on the former company's behalf, lodged the request for reference or appeal explaining that, in the absence of a reinstatement of the company, it - being a dissolved company - has lost its rights to pursue the reference or appeal before the relevant appellate forum and that the Commissioner proposes to argue as a preliminary matter before the Administrative Appeals Tribunal or the court, as the case may be, that the dissolved company has ceased to be a legal person and no reference or appeal may be prosecuted by it or on its behalf.

21. In both situations a copy of the letter sent to the person who lodged the request for reference or appeal should be sent either to the Administrative Appeals Tribunal or to the Registrar of the Supreme Court as appropriate.

22. If the dissolved company is reinstated before transmission of the reference or appeal, the processing of the reference or appeal would proceed as normal and no preliminary argument would be raised about the company's status. If the dissolved company is reinstated after transmission of the reference or appeal, whether or not the reference or appeal would proceed to a hearing as normal would depend on the

appellate tribunal's attitude towards the period of time that has elapsed between transmission of the reference or appeal and the reinstatement of the company and what (if any) order of the court is made under sub-section 458(1) or sub-section 459(6) of the Code to place the company, the Commissioner and all other persons in the same position as nearly may be as if the company had not been dissolved or had its registration cancelled.

Dissolution after transmission of reference or appeal

23. The Commissioner would argue as a preliminary matter in this situation before the Administrative Appeals Tribunal or the court that the company by being dissolved has lost its rights to pursue the reference or appeal and further that there is no taxpayer to discharge the burden under paragraph 190(b) of the ITAA of proving the assessment excessive. It is then a matter for the Administrative Appeals Tribunal or the court to determine the reference or appeal.

24. If the company is dissolved after transmission of the reference or appeal but is subsequently reinstated, whether or not the hearing of the reference or appeal would proceed as normal would depend on the appellate tribunal's attitude towards the period of time that has elapsed between dissolution of the company and its reinstatement and what (if any) order of the court is made under sub-section 458(1) or sub-section 459(6) of the Code to place the company, the Commissioner and all other persons in the same position as nearly may be as if the company had not been dissolved or had its registration cancelled.

COMMISSIONER OF TAXATION
8 August 1986