

Parliamentary Joint Committee on Corporations and Financial Services

Inquiry into Corporate Insolvency in Australia

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

January 2023

Agency: Australian Taxation Office

Question No:

Topic: Tax clearance and simplified liquidation

Reference: Spoken (13 December 2022)

Senator/MP: Paul Scarr

Question:

Senator SCARR: I've got some questions on unlawful phoenixing, but just before I get to those, I want to tidy up this one issue. ARITA recommends in relation to simplified liquidations:

Remove the requirement to obtain clearance from the ATO prior to a dividend being declared and for proof of debts to be lodged for claims of less than \$10,000. Creditors would retain the right to judicial determination of a rejection of their claim (this would not be captured by the prohibition on litigation).

So, it seems that in the context of the current mechanism for simplified liquidations, we've heard evidence that isn't being used, or hardly at all, at the moment, which is defeating the legislative intent. One of the hurdles is the requirement to obtain clearance from the ATO prior to a dividend being declared. Any response to that? Feel free to take it on notice if you like.

Mr Busby: I'm happy to take it on notice, but I probably would just highlight that it is a requirement for a liquidator, if they are going to pay a dividend to unsecured creditors, that they do receive a tax clearance, and that involves ensuring that any outstanding lodgements are made and sufficient money is set aside to deal with any tax debt that arises from that.

Senator SCARR: I guess the issue is that if there are lodgements that haven't been made, there's hardly any money left, so then the whole concept of obtaining clearance from the ATO adds another administrative burden which is never going to be met. Therefore, why have that as an additional burden when you're talking about claims of less than \$10,000. Do you appreciate the point?

Mr Busby: Yes, I do appreciate the point.

Senator SCARR: If you've got anything to add on that, feel free

Answer:

The ATO are not aware of any evidence that the low adoption rate of the simplified liquidation process is due to the tax clearance regime.

Generally, liquidators (and receivers) are required to obtain a clearance before parting with any assets that are available to pay unsecured creditors regardless of whether the ATO is a creditor.

The Commissioner of Taxation (the Commissioner) can require a liquidator to prepare and lodge any overdue documents for a company in liquidation, including documents for periods prior to the liquidator's date of appointment (see Law Administration Practice Statement PS LA 2011/15 available on the ATO website).

The Commissioner will only require lodgment of any income tax returns by a liquidator after considering the following factors:

- the prospect for, and likely size of, a dividend being paid to unsecured creditors
- the likelihood that the return would, if lodged, reveal an increase in the tax liabilities owed to the ATO
- the availability of books and records of the entity that would make it possible for the liquidator to prepare the returns
- the likelihood that the liquidator's cost of preparing those returns would be covered by the assets of the liquidated company without resulting in an inordinate adverse impact on returns to other creditors
- the wider community benefits of having the tax returns lodged

Similarly, in directing the liquidator as a representative of an incapacitated entity to give a GST return, the Commissioner must consider:

- the likelihood a dividend to unsecured creditors of the incapacitated entity will be declared, or the likely amounts of any such dividend
- the likelihood any GST return or return for fuel tax would result in a liability
- whether the cost to the representative of preparing the return would result in an unreasonable impact on the other creditors of the incapacitated entity
- whether the availability of records make it possible to prepare the return.

These factors are intended to ensure that liquidators will only be required to lodge where the circumstances reasonably support that requirement.