

update

3 October 2008

Friday Facts: Genuine dispute of tax assessment not enough to set aside statutory demand

On 3 September 2008, the High Court handed down its decision in favour of the Deputy Commissioner of Taxation (“Deputy Commissioner”) v Broadbeach Properties, MA Howard Racing Pty Ltd and Neutral Bay [2008] HCA 41 (“Neutral Bay”). It held that statutory demands which had been issued by the Deputy Commissioner, based on notices of assessment which were subject to dispute, could not be set aside despite the existence of proceedings objecting to the assessments.

The respondents to the appeal were related corporations that were controlled by a common director. They were involved in construction and sale of residential apartments. They had failed to pay amounts claimed for GST, interest and penalties which had been imposed on them by the Deputy Commissioner.

The Deputy Commissioner issued a statutory demand on the second respondent under the provisions of section 459E of the Corporations Act (Cth) (the “Act”) seeking payment of the running balance account (“RBA”) debt of \$6,389,785.75 principally being for GST, interest and penalties owed under taxation laws.

On the same day the Deputy Commissioner issued a statutory demand on the third respondent for a RBA debt of \$8,433,350.79 – again, principally for GST, interest and penalties. Approximately a month thereafter the Deputy Commissioner issued a statutory demand on the first respondent for a default assessment under Part IVX of the Assessment Act.

The respondents refused to pay the amounts of the statutory demands, relying on legal advice which they had received that each of the assessments that had been issued were incorrect. Having objected to the assessments, and the objections being disallowed by the Deputy Commissioner, proceedings were commenced by the second and third respondents in the Administrative Appeals Tribunal (the “AAT”)

for review of the Deputy Commissioner’s decision and by the first respondent to the Federal Court of Australia. The proceedings were commenced the day after the first respondent had been served with a statutory demand.

The respondents applied to the Supreme Court of Queensland for orders that the statutory demands be set aside pursuant to section 459G and 459J of the Act. In determining whether the application to set aside under section 459G of the Act should succeed, the Court needed to be satisfied of either or both of the following:

1. there was a genuine dispute between the company and the respondent about the existence or amount of the debt to which the demand related; and/or
2. that the company had an offsetting claim.

In order to determine whether the application should succeed under section 459J of the Act, the Court needed to be satisfied that there was “some other reason” for the statutory demand to be set aside.

The primary Judge considered the application made by the respondents and ordered that the statutory demands be set aside, given the proceedings challenging the assessments were pending.

The Deputy Commissioner appealed to the Court of Appeal who dismissed the appeal. The Deputy Commissioner subsequently appealed to the High Court.

The High Court considered the submissions which the Deputy Commissioner put in support of the appeal. They were (amongst other things) that the provisions of the taxation laws provided that a notice of assessment was “conclusive evidence” of the due making of an assessment and that any pending challenge to the assessment did not impede recovery in the meantime.

The argument by the Deputy Commissioner was even if the taxpayer had a reasonably arguable case that the notice of assessment was incorrect, it did not give rise to a “genuine dispute” nor an “offsetting claim” nor “some other reason” to set aside the statutory demand. However, the High Court did determine that the application of general interest charge to certain administrative overpayments was open to genuine dispute and the statutory demand ought to be varied to that extent.

The implications of the decision in Neutral Bay are that tax payers now have no basis to make application to set aside a statutory demand on the basis that they dispute the notice of assessment. Therefore not being able to make such an application on a successful basis, the company will be deemed to have committed an act of insolvency if it does not pay the amount of the statutory demand within 21 days.

The consequence is that the company will be left in a position where it will be necessary for it to demonstrate its solvency when an application is made to wind up the

company. That will include the necessity to prepare audited accounts which prove solvency of the company and its ability to pay its debts as and when they fall due.

For more information

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