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Rights and remedies of a taxpayer in the sights of the Commissioner of Taxation: Part 2

Part 1 of this article analysed the rights and remedies of taxpayers being pursued by the Commissioner. Part 2 analyses the avenues available to taxpayers to stay recovery proceedings or the execution of judgment, to control the liquidator or trustee in bankruptcy, and to agree with the Commissioner to ameliorate the harshness of the usual position (which is that the Commissioner can proceed to recover moneys owing under an assessment as a debt, even though that assessment is being challenged in other proceedings).

Part 1 of this article concluded that, once an assessment has issued, a taxpayer must race to prosecute under Pt IVC of the *Taxation Administration Act 1953* (Cth) (TAA53) before the Commissioner recovers the tax debt. It was perhaps sobering reading for those who act for taxpayers. As a result of two recent decisions the tide may be turning.¹ Part 2 considers other avenues to assist a taxpayer in reaching Pt IVC proceedings.

STAY OF RECOVERY PROCEEDINGS OR STAY OF EXECUTION OF JUDGMENT

In the event that the Commissioner decides to pursue recovery, there is little a taxpayer can do. As noted in *Deputy Commissioner of Taxation v Mackey* by Glass JA:²

"It is, in my view, a misconception, as my brother Hutley has said, to treat the Commissioner and the taxpayer in proceedings for a stay as litigants who start on equal terms, as do a plaintiff and a defendant in Equity proceedings, where the balance of convenience is being examined to see whether an interim injunction should or should not be granted.

I consider that the effect of the legislative direction in s 201 when modified by the courts' recognized power to stay proceedings in the exercise of its discretion have a combined effect of a different kind. If the metaphor is to be retained, the needle stands in the Commissioner's favour close to 100 and it requires a weighty case to be presented by the taxpayer in order to depress it below the halfway mark. It is sufficient to say that none of the matters adverted to here at any stage had this effect in my opinion."

As Hutley JA said:²

"The power to stay, in my opinion, under s 201 should be exercised with great caution and only under special circumstances. In deciding whether to exercise it, there is no similarity whatsoever to the issue which faces the court when it is asked to grant an interlocutory injunction ...

But there are only two cases where it is clear the court should exercise that discretion. First, the comparatively rare case where the Commissioner abuses his position, for example by assessing and endeavouring to collect tax in defiance of a decision of the High Court or other superior court precisely in point. Second, in cases of extreme personal hardship to a taxpayer called upon to pay. The obligation to pay which has been cast upon him by law is not a hardship of itself and the mitigation of the effect of inflation and the burden of interest is a matter for the legislature, not for the court."

In addition to the two clear cases referred to by Hutley JA, another case for a stay may be made out where the Commissioner sought to recover simultaneously against two taxpayers with alternative assessments in respect of the same income, in order to ensure that there was not double recovery of the tax.⁴

Where the decision is a reviewable decision pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), s 15 of that Act empowers the Federal Court to grant a stay of the decision and a stay of the recovery process, or execution of judgment (or otherwise stay the decision), on such conditions as it thinks fit.³

In *Hell's Angels Ltd v Commissioner of Taxation*,⁵ the taxpayer had applied for an extension of time to pay the amounts due under the amended assessments. The application was refused but reasons were not given. The taxpayer appealed that decision under the ADJR Act. An application was made to the Federal Court to restrain the Commissioner from prosecuting Supreme Court recovery proceedings, pending the determination of the ADJR proceedings. The court considered whether there was a serious question to be tried in the ADJR proceedings and the balance of convenience. The court held that, on the one hand, the taxpayer had made genuine objections to the assessments and that the Commissioner had accepted a contention that the taxpayer had had no income in the 1983 year as he had not required the taxpayer to pay instalments. On the other hand, the Commissioner had not provided any reasons for the decision and, accordingly, the court held that the Hell's Angels had an arguable case that the Commissioner, when considering the application for an extension of time, failed to take into account relevant considerations and made an unreasonable decision. The court therefore exercised the discretion in favour of the Hell's Angels.

French J (as he then was) in *Deputy Commissioner of Taxation v Warrick (No. 2)*⁶ looked at the relevant matters the court takes into account when ordering a stay of recovery proceedings or execution of judgment. His Honour held that:

"Absent a determination of objections and absent any reasonable explanation for the failure to determine them, the question arises whether the recovery proceedings or execution of the judgment should be stayed. In *Snow v Deputy Commissioner of Taxation* (1987) 14 FCR 199, I set out factors relevant to the question whether or not a stay of recovery proceedings should be ordered. They were as follows:

1. The policy of the ITAA 1936 as reflected in its provisions gives priority to recovery of the revenue against the determination of the taxpayer's appeal against his assessment.
2. The power to grant a stay is therefore exercised sparingly and the onus is on the taxpayer to justify it.
3. The merits of the taxpayer's appeal constitute a factor to be taken into account in the exercise of the discretion.
4. Irrespective of the legal merits of the appeal a stay will not usually be granted where the taxpayer is party to a contrivance to avoid his liability to payment of the tax.
5. A stay may be granted in the case of abuse of office by the Commissioner or extreme personal hardship to the taxpayer called on to pay.
6. The mere imposition of the obligation to pay does not constitute hardship.
7. The existence of a request for reference of an objection for review or appeal is a factor relevant to the exercise of the discretion."

In that case, French J considered that the unexplained delay on the part of the Commissioner in making the objection decision warranted a stay to enable the taxpayer to give the Commissioner a notice under s 14ZYA TAA53 to force him to make the objection decision or to create a deemed refusal in order to enliven appeal or review rights. His Honour said that "the priority given to recovery of the revenue should be qualified by an appropriate recognition of the taxpayer's right to object and to have his objection determined and the Commissioner's duty in that respect".

Until recently, when considering an application for a stay of proceedings or of execution, the potential for bankruptcy or liquidation arising as a result of the debt was not sufficient to ground an application for a stay. It was considered that bankruptcy was merely a consequence of the failure to pay debts due and payable and not a special hardship.⁷ The attendant risk to Pt IVC TAA53 rights would also appear not to be grounds for a stay.⁸ Recently, however, the Queensland Court of Appeal disallowed the Commissioner's appeal against the decision of the Trial Judge to grant of a stay of recovery proceedings to two taxpayers at risk of bankruptcy with the attendant loss of Pt IVC rights.⁹

The fact that review proceedings (of a decision under an enactment) under the ADJR Act (for instance, to extend the due

date) or similar relief being sought under s 39B of the *Judiciary Act 1903* (Cth) were on foot might, if properly brought, assist the taxpayer in obtaining a stay: otherwise the review proceedings would be rendered nugatory.¹⁰

WINDING UP AND BANKRUPTCY

The existence of Pt IVC TAA53 proceedings does not give rise to a "genuine dispute" as to the existence or amount of a debt in proceedings to set aside a statutory demand, nor does it justify the setting aside of the statutory demand "for some other reason".¹¹ In *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*, it was made plain that a taxpayer is not able to set aside a statutory demand on the basis of the pendency of Pt IVC proceedings for

distinguish *Broadbeach*.¹⁷ The Supreme Court of Queensland did not engage with the submission and, ultimately, the taxpayer failed in setting aside a statutory demand. It remains to be seen whether different policy considerations arise where an objection has not yet been determined, as opposed to a case where the objection has been determined and the taxpayer is pursuing appeal or review rights.¹⁸

A question unanswered by the High Court in *Broadbeach* was whether a "genuine dispute" or "some other reason" might be found in an unresolved dispute concerning whether the Commissioner ought to have granted a deferral of recovery proceedings or a deferral of the due date of the liability.¹⁹ If the Commissioner had or ought to have granted the deferral, he may not be entitled to issue a statutory demand, due to the

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the reason that s 177 of the *Income Tax Assessment Act 1936* (ITAA36) determines conclusively (except in Pt IVC proceedings) the amount of the tax liability.¹² However, the High Court noted the important concession made by the Commissioner that the merits of Pt IVC proceedings might be relevant on an application to wind up the taxpayer.¹³ Similar considerations arise in relation to bankruptcy proceedings.¹⁴

There is authority for the proposition that the Commissioner is entitled to recover taxation debts, notwithstanding an outstanding objection, he does not need to rely on s 14ZZM or 14ZZR TAA53.¹⁵ Those sections operate to protect the Commissioner against any allegation that bringing proceedings to recover a taxation debt while an appeal or review is on foot would be an abuse of process.¹⁶ However, recently, a taxpayer emphasised to the court that ss 14ZZM and 14ZZR TAA53 had no application where an objection had not yet been determined, and sought to

moratorium created by the agreement to defer the due date or defer recovery. The due date is a not a particular of the assessment¹⁶ and s 177 ITAA36 can not be relied on to conclusively demonstrate the due date. The due date is determined in accordance with s 204 ITAA36 subject to the exercise of the Commissioner's discretion under s 255-10 (and perhaps 255-5) TAA53. Furthermore, ss 14ZZM and 14ZZR TAA53, which provided the foundation for the legislative policy underpinning the High Court decision in *Broadbeach*, do not have the same impact in this context (that is, due date), referring as they do to Pt IVC TAA53 proceedings and not judicial review proceedings. In any event, even if not grounds to set aside a statutory demand, the existence of the judicial review proceedings might form a proper basis for the court to decline to make an order for winding up.²⁰

The Federal Court also has inherent jurisdiction to prevent an abuse of process²¹ or an interference with the

administration of justice.²² In such a case, the court might order a stay of the statutory demand, pending review of the administrative decisions on the basis that to not do so would render the review proceedings nugatory.

These mechanisms may demonstrate that a genuine dispute as to liability to pay the debt on this basis exists, or that there is some other reason for setting aside the statutory demand, or form the basis for the court refusing to make an order for winding up or sequestration.

CONTROLLING THE LIQUIDATOR OR TRUSTEE

Once a liquidator or trustee in bankruptcy has been appointed, the bankrupt or the shareholders might entice that person to prosecute a Pt IVC TAA53 appeal or review by offering to fund those proceedings. If the offer is rejected, the court may order the liquidator or trustee to pursue the proceedings.²³ Recently, the Federal Court granted leave to a shareholder to prosecute Pt IVC proceedings in the AAT in the name of the company taxpayer (in liq) where the liquidator had declined to do so.²⁴

THE SMOKING GUN

In order to be successful in any challenge against a decision of the Commissioner, it is imperative that the taxpayer be in a position to point to the impugned conduct. There are several mechanisms for gathering evidence in relation to conduct of the Commissioner:

1. where the decision being challenged is a decision under an enactment, as defined in s 3 ADJR Act,²⁵ a request for a statement of reasons may be made pursuant to s 13 ADJR Act. Schedule 2 excludes certain decisions, such as the decision to institute civil proceedings from the obligation to give reasons;
2. a request may be made under the *Freedom of Information Act 1982* (Cth) (FOI Act) for documents relating to the issuing of assessment and various decisions of the Commissioner. The benefit of such an application is that the taxpayer need have no basis for suspecting improper conduct. The FOI Act reflects public policy that there is public interest²⁶ in an individual's right to know, and that there is public interest

in disclosure of the inner workings of government and the administration (subject to certain exclusions and exceptions).²⁷ However, such requests usually do not produce results in a timely fashion;²⁸

3. in the event that s 39B TAA53 proceedings or an action for misfeasance in public office were seriously contemplated, another option is to make an application for preliminary discovery in those proceedings.²⁹ However, in order to proceed down such a path, the putative claims must first be articulated. As mentioned previously, it would be necessary to identify the specific power that has been abused or the conduct that has caused the damage; and
4. once proceedings under the ADJR Act or s 39B TAA53 are instituted, it might be possible to get documents under a notice to produce or under subpoena.³⁰ A request for particulars or an order for discovery are unlikely to be successful unless the taxpayer has a sufficient foundation to resist an allegation of fishing.³¹

AGREEMENTS WITH THE COMMISSIONER

To avoid any attempts by the Commissioner to seek to recover the tax pending determination of objections and appeals, it is possible³² to enter into a 50/50 arrangement with the Commissioner under which the taxpayer pays 50% of the primary tax in dispute and 50% of the shortfall interest charge (for tax years from 2004/05 onwards). In such a case, the Commissioner generally agrees to remit the general interest charge on the outstanding 50%, pending final resolution of the dispute.³³

It should be noted that if a taxpayer accedes to the Commissioner's demands to pay some or all of a tax liability to the Commissioner, and is thereafter successful on objection to the amended assessment or on appeal to the Tribunal or a court, there is an entitlement to interest on the overpaid amount.³⁴

CONCLUSION

Part 2 of this article has considered approaches which may be effective in some situations — most requiring either the cooperation of the Commissioner or

evidence of egregious conduct on the part of the Commissioner (which is not common or readily obtained). It remains the case that a taxpayer the subject of an assessment, who wishes to dispute the assessment, must move with exceptional speed to prosecute Pt IVC TAA53 proceedings, lodge all appeals or requests for review as soon as possible, and seek all available expedition from the Court or Tribunal.

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References

- 1 *Deputy Commissioner of Taxation v Denlay* [2010] QCA 217; and *HFGC Nominees (No 2) Pty Ltd v Hancock as Liquidator of 246 Arabella Investments Pty Ltd (in liq)* [2010] FCA 1005.
- 2 (1982) 45 ALR 284 at 290.
- 3 S 23 of the *Federal Court of Australia Act 1976* (Cth) also gives the Federal Court power to make orders to prevent the Commissioner from pursuing recovery or execution proceedings.
- 4 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 201–202 per Brennan J; and *Deputy Commissioner of Taxation v Faint* [1988] 2 Qd R 494 at 497–498. But see *Commissioner of Taxation v Grimaldi (No 9)* [2009] FCA 1404 (can get judgment against multiple taxpayers, but only enforce full payment against one).
- 5 (1984) 6 ALD 420.
- 6 (2004) ATC 4779 at [105].
- 7 *Deputy Commissioner of Taxation v Ackers* (1989) 89 ATC 4725 at 4727.
- 8 *Deputy Commissioner of Taxation v Ho* (1996) 131 FLR 188.
- 9 *Deputy Commissioner of Taxation v Denlay* [2010] QCA 217.
- 10 An argument in *Ho* that the taxpayer could lose the fruits of the appeal (referring to the Pt IVC TAA53 rights) was unsuccessful. However, in that case, no judicial review proceedings were on foot, there were only Pt IVC proceedings and, in such a case, the existence of ss 142ZM and 142ZR TAA53 foreclosed the argument. On the other hand, see the discussion by Ireland J that, in cases not concerning ss 142ZM and 142ZR TAA53, the loss of the "fruits of an appeal" is a significant circumstance warranting a stay; *Bridges v Australian Consolidated Press Ltd* (unreported, NSW Court of Appeal, 16 June 1970); *Scarborough v Lew's Junction Stores Pty Ltd* [1963] VR 129 at 130; and *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1972) 7 SASR 268.
- 11 *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008)237 CLR 473 at [58]; see ss 459G and 459J of the *Corporations Act 2001* (Cth).
- 12 *Broadbeach* at [29], [49], [57], [58].
- 13 *Broadbeach* at [13]. The Commissioner conceded that the merits of the taxpayer's Pt IVC TAA53 proceedings may be a relevant consideration in the winding-up proceedings. See also [62], where the court said that the progression of the Pt IVC proceedings would be relevant, if at all, at the hearing of the winding-up application. The Commissioner's concession in *Broadbeach* has been used by a taxpayer in *James v Deputy Commissioner of Taxation* [2008] FMCA 1189 to obtain an order that evidence of the dispute in a Pt IVC proceeding against the Commissioner as to the nature and extent of the taxpayer's liability be admitted in proceedings where the Deputy Commissioner was seeking a sequestration order.

- 14 In *Ahern v Deputy Commissioner of Taxation* ((1987) 76 ALR 137), the Full Court of the Federal Court (Davies, Lockhart and Neaves JJ) held (at 148) that the existence of s 201 ITAA36 (the precursor provision to ss 14ZZM and 14ZZR TAA53) did not deprive the court of the jurisdiction to adjourn a bankruptcy petition or to consider whether or not to make a sequestration order. See paras 39–41 (if a genuine dispute, the court may investigate before a bankruptcy-making order, which involves a change of status of the taxpayer and quasi-penal consequences).
- 15 *Deputy Federal Commissioner of Taxation v Niblett* [1965] NSW 1552; and *Hoare Bros Pty Ltd v DFC of T* (1996) 62 FCR 302.
- 16 See, for instance, *Watson v Federal Commissioner of Taxation* ((1999) 96 FCR 48), in which it was held that the issue of a s 264 ITAA36 notice while criminal proceedings were on foot was a contempt of court as it risked interfering with the administration of justice.
- 17 *Crystal Point v Deputy Commissioner of Taxation* [2010] QSC 154.
- 18 It is notable that, in one of the rare cases where the court granted a stay of execution (*Warrick* (No. 2)), the reason was the Commissioner's delay in determining the objection decision.
- 19 For instance, if a request to defer the due date or recovery was still outstanding or, if denied, was the subject of an application for review (either under s 39B of the *Judiciary Act 1903* or under the ADJR Act).
- 20 In the context of bankruptcy, in *Ahern v Deputy Commissioner of Taxation* ((1987) 76 ALR 137), the Full Court referred to the existence of judicial review proceedings but considered those matters peripheral to the issues before the Full Court concerning setting aside the sequestration order.
- 21 In *Walton v Gardiner* ((1993) 177 CLR 378), Mason CJ, Deane and Dawson JJ said that the inherent jurisdiction of a superior court to stay its proceedings for abuse of process: "... extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness."
- 22 The inherent power of the court can be exercised in any circumstances where the requirements of justice demand it and thus cannot be restricted to closed and defined categories of cases: *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335 at 344; and *Reid v Howard* (1995) 184 CLR 1 at 16 per Toohey, Gaudron, McHugh and Gummow JJ, and cases cited there. The inherent jurisdiction of a superior court extends to the punishment of conduct calculated to interfere with the due administration of justice, including conduct that seeks to bring improper pressure on a party to litigation: K Mason, "The inherent jurisdiction of the court" (1983) 57 ALJ 449 at 452; *Attorney-General v Times Newspapers Ltd* [1974] AC 273; and *Y and Z v W* [2007] NSWCA 329; 70 NSWLR 377.
- 23 A liquidator need not incur any expense unless there is sufficient property available. However, the court or ASIC, on application by a creditor or contributory, may direct a liquidator to incur a particular expense on condition that the creditor or contributory indemnify the liquidator: s 545 of the *Corporations Act 2001*. In the context of personal insolvency, a bankrupt affected by any decision of the trustee may seek any order from the court under s 178 of the *Bankruptcy Act 1966* to prosecute the Pt IVC proceedings, if just and equitable.
- 24 *HFGC Nominees (No 2) Pty Ltd v Hancock as Liquidator of 246 Arabella Investments Pty Ltd (in liq)* [2010] FCA 1005.
- 25 An assessment or a decision leading up to an assessment is expressly excluded from review by Sch 1, para (e) ADJR Act.
- 26 Notions of the public interest in the right to know arise for consideration in connection with claims of public interest immunity: *Sankey v Whitlam* (1978) 142 CLR 1; and *Alistair v R* (1984) 154 CLR 404.
- 27 The FOI Act confers a positive and legally enforceable right to obtain access to documents from government, other than exempt documents (s 11 FOI Act). Section 61(1) FOI Act relevantly provides that a document may be exempt from production if (among other things) it would be injurious to the public interest to disclose it: see s 36(1)(b) FOI Act; and *Murtagh v FCT* (1984) 84 ATC 4516.
- 28 Often the Commissioner issues a position paper well ahead of issuing an assessment. An FOI application in respect of any determinations disclosed in the position paper (such as the forming of an opinion that there had been an avoidance of tax due to fraud or evasion) might produce a timely response.
- 29 Federal Court Rules, Order 15A(6).
- 30 Federal Court Rules, Order 27 (Subpoenas), and Order 33, r 12 (Notice to Produce). Note, however, s 16(3) ITAA36 regarding subpoena shield.
- 31 *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198 at 206–207.
- 32 The Commissioner does not agree to this in all cases.
- 33 *ATO Receivables Policy*, ch 28.
- 34 Pt III of the *Taxation (Interest on Overpayment and Early Payments) Act 1983* (Cth). This entitlement to interest is only payable on primary tax and some penalty amounts, but does not apply to all overpayments of general interest charge or shortfall interest charge.

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