

Article Information

Author: Stefano Calabretta

Service: Dispute Resolution & Litigation, Restructuring & Insolvency

Company liquidation - debits and credits by the Commissioner of Taxation

On 17 April 2015, the Supreme Court of New South Wales delivered a decision with important ramifications for liquidators and the Commissioner of Taxation in the application of debits and credits in a company's running balance taxation account following liquidation.

The facts

Receivers and managers were appointed to 4 Doonan Street Collinsville Pty Ltd (in liquidation) (**Company**) by a secured creditor on 18 August 2010. Subsequently, voluntary administrators were appointed to the Company on 27 August 2010 and ultimately, by resolution of its creditors on 31 March 2011, the Company was placed into voluntary winding up pursuant to section 439C of the *Corporations Act 2001* (Cth). One of the administrators, Atle Maxwell-Crowe, was appointed as the Company's liquidator (**Liquidator**).

The receivers carried out a sale of the Company's property and business assets on 29 December 2010. They subsequently lodged a tax return for the period from their appointment until 30 June 2011 and recorded income of \$1,543,691, which included a net capital gain of \$1,400,733, giving rise to a consequential tax liability. The receivers paid the resulting tax to the Commissioner and retired from office on 2 May 2012.

In light of the capital gains tax paid by the receivers, the Liquidator submitted an amended tax return for the year ending 30 June 2011 with the result that the Company's tax liability was reduced by \$651,340.85 (**Credit Amount**). This amount was credited by the Commissioner to the Company's income tax account on 7 February 2013, however the Credit Amount was not a complete reflection of the Company's tax position - the Company had not lodged business activity statements for July and August 2010 or a tax return for the period up to 30 June 2010.

Between 16 February 2013 and 29 April 2013, the Commissioner proceeded to debit five amounts totalling \$287,606.80 (**the Debit Amount**) against the Credit Amount in the various integrated taxation running balance accounts in respect of the Company for income tax, withholding tax, income tax, GST and the superannuation guarantee charge.

The questions for determination

Whilst the case addressed and dealt with a number of complicated provisions of tax legislation and in particular the *Taxation Administration Act 1953* (Cth) (**TAA**), the case centred around whether the Commissioner ought to repay the Debit Amount to the Company and the Liquidator. The principal questions for determination were:

- Was the Commissioner entitled to apply debits in a company's running balance account in accordance with the TAA as it normally would in respect of a solvent, trading company *following* the passing of a resolution for the winding up of a company?
- In the alternative, if the Commissioner is entitled to apply debits under the TAA following the liquidation of a company, did the process of applying debits to the Credit Amount contravene section 500(1) of the *Corporations Act 2001* (Cth)?

Section 500(1) of the *Corporations Act 2001* (Cth) relevantly provides that any attachment, sequestration, distress or execution put in force against the property of the company *after* the passing of the resolution for voluntary winding up is void.

The argument advanced by the liquidator was that in applying the debits following the liquidation of the Company, the Commissioner was acting outside its power and, in addition or in the alternative, contravened section 500(1) of the *Corporations Act 2001* (Cth) on the basis that:

- The Credit Amount constituted property of the Company and that the Commissioner was under an obligation to return those monies to the Company.
- The process of applying the debits to the Credit Amount constituted attaching and/or sequestering and/or raising a distress and/or executing against that property and was avoided by section 500 of the *Corporations Act 2001* (Cth).

The decision of the Court

The Court first determined that the Commissioner was entitled to apply debits in a company's running balance account in accordance with the TAA even *following* the passing of a resolution for the winding up of a company, so long as the debits related to events that occurred prior to the liquidation which would have been reflected in the tax accounts maintained by the Commissioner prior to the liquidation of the Company had the Company lodged its business activity statements and 2010 tax return in a timely fashion. Justice Black concluded that there is nothing in the TAA to reflect any public policy that a liquidator or a Company's creditors should be permitted to take advantage of a company's delay in lodgement of tax returns, or in an extreme case, a decision to defer the lodgement of tax returns in anticipation of a winding up.

Regarding the question of whether in this case the Commissioner offended section 500(1) of the *Corporations Act 2001* (Cth), Justice Black did not accept that the Credit Amount was in this case "property" of the Company within the meaning of that section. Instead, the Court found that the Credit Amount against which the debits had been made would not become property of the company until a net balance had been determined by the Commissioner. Furthermore, Justice Black did not accept that the steps taken by the Commissioner amounted to either sequestration, execution (where no judgment of the Court was involved) or distress. Accordingly, there was no breach of section 500(1) of the *Corporations Act 2001* (Cth).

Ultimately, however, the Liquidator was partially successful on his claim on a separate uncontested ground of restitution which resulted in judgment in his favour in respect of four out of five of the debits totalling \$113,914.45. Curiously, however, this aspect of the case was dealt with quite expeditiously at the end of the decision. Given that this ground was conceded by the Commissioner, one can't help but wonder whether the Commissioner's primary objective in defending this application was to seek a precedent in relation to the preliminary matters referred to above.

Take-away points

This case is important because it has now clearly delineated the law with respect to how the Commissioner of Taxation may treat debits and credits in relation to a company in liquidation insofar as pre-liquidation events and circumstances are concerned. Furthermore, the case has also established that the process of applying debits to a company's running balance taxation account post-liquidation does not necessarily offend section 500(1) of the *Corporations Act 2001* (Cth).