ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

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ATO Crackdown on Non-compliant Behaviors in Terms of Share Transactions

By Sophie Bai

It is one of the prime responsibilities of The Commissioner of Taxation to ensure that Taxpayers meet their taxation and superannuation obligations. Failure to address non-compliant behaviors will potentially undermine the public's confidence in the credibility and reliability of the taxation and superannuation systems, it will also raise concerns about the ATO's capacity in administering these systems.

Therefore, Share Transactions Data Matching Program Protocol was introduced by the ATO in the year 2014 as one of the strategies to identity and deal with non-compliant behaviors, more importantly, it ensures that Taxpayers are correctly meeting their taxation obligations in respect of their share transactions.

This Matching Program will source details of share acquisitions and sales from major Companies that offer share transaction services from 20 September 1985 to 30 June 2016. It collects data that includes the name and address of the Taxpayer and the price & number of shares acquired or sold. The collection of data occurs twice annually covering the periods January to June and July to December, occurring during the quarter following the end of periods.

The main actions resulting from this Program are as follows:

1. Those, who have an obligation to lodge their outstanding taxation returns but have not done so, will be identified by the ATO and be reminded of their outstanding lodgement;
2. The date generated from this program will become available to Taxpayers on an annual basis at the time when they are lodging their tax returns via electronic pre-fill channels, which informs them of their obligations to report their capital gains from share transactions;
3. Those that are not registered for their taxation obligation are more likely to be identified by the ATO through this program and accordingly, their taxation obligations will be required to be registered;
4. A minimum twenty-eight (28) days will be provided to Taxpayers for them to respond to any discrepancy matching obtained by the ATO before any administration action is taken. However, if Taxpayers fail to comply with their taxation obligations after being reminded, prosecution action may be taken; and
5. This program also requires Taxpayers to comply with their taxation and superannuation obligations, including registration requirements, lodgement obligations and payment responsibilities.

As you can see from the above, this Share Transactions Data Matching Program Protocol promotes the integrity of the taxation and superannuation systems and instils further community confidence. In particular, it allows the ATO to be in a better position to identify non-complaint behaviours, which would enhance the recovery of the taxation revenue.

However, it should be reminded that the implementation of this program will also bring additional costs associated with obtaining and storing the data to the ATO and will require more data analyst, compliance and governance resources.

Condon Update

By Lyn Dong

Thank you to all who attended the Condon Forum on 26 March 2015. It was our great pleasure to have Hon. Robert McClelland, Andrew Faber, Mathew Korff and Schon Condon to cover our topic of "The Unknown Pitfalls of Becoming a Director"
Watch this space for the date of the next Forum which will be covering "Demystifying Trusts".

Here are some Kodak moments…

Speakers at the Condnon Forum: (L-R) Andrew, Schon, Robert, Mathew and Richard.

The indefatigable Condon Associates Group helping businesses in Sydney.

The Scientist, The Engineer and The Economist

By Schon G Condon RFD

One can almost be forgiven for giving up reading all the information that keeps coming from every quarter about the state of the economy and its future performance. I certainly acknowledge that much of it can be divided into various camps ranging from the doom-sayers through to the frivolous opportunist who cannot see anything other than an ever increasing market and economy (in all areas) that will never fall or fail.

I must say of all my university subjects, and being an NSW Institute of Technology (now UTS) graduate there was quite a broad range of subjects that made up our degree, the economic subjects always left me with a sense of vagueness and generality that leaves an accountant with a bent for engineering to feel a little uncomfortable. In querying a lecturer about it at the time he said that he could explain it best with a story:

'Once there were three men who had been lost in a desert for some considerable time. The group was made up of a scientist, an engineer and an economist. They had not seen water in days, and the ONLY thing they had left between them was a can of beans. They had reached the point where if they did not consume the beans then there was a real chance that they would expire! The beans suddenly meant the difference between life and death. They sat there, weary, staring at the can trying to decide how to open it. It was the scientist who spoke first – "I'll construct a specially designed small ditch in the sand with specifically calculated angled sides that will reflect the heat from the sun directly back onto the can and as it heats up the contents will expand and break open the tin." This was disagreed with as all thought that the can would explode and the contents would be blown everywhere; lost and inedible. So it was next the turn of the Engineer, he said "I'll scour the desert for two rocks. One rock to use as an anvil, and the other to use as a hammer, I'll then hit the can until I'm able to brake the lid of the can off." This too was denigrated as a failing course of action as they would no doubt expire before they found the rocks. With all ideas now exhausted the two expiring men turned to the economist to see if he could provide them with the course of action that would finally save their lives. The Economist, knowing now that it was up to him, their lives literally rested in his hands; he picked up the can of beans and studied it intently. He then turned to his two colleagues and said:

"Firstly I'll assume I have a can opener…"'

The studies of the future based on a series of assumptions provide a vehicle that enables a series of tests or comparisons to be made as to how a market may react to given influences. This coupled with prior experience enables, at least theoretically, some degree of predictability of the future.

Inside this issue:

With concern being highlighted by the Reserve Bank Board, CEO's of Banks, Insurers and many others about the state of both our property and share markets I find it genuinely surprising that there seems to be little central effort being made to honorably come to grips with what is the new economy. I am yet to see or read anything comforting coming out of Europe with increasing references to more and more unemployment. With more and more work being off loaded overseas our own employment position is teetering. I was recently approached to act as someone's mentor for a professional accounting body in exchange for an unpaid intern role. I offered the mentorship but not the unpaid employment.

Just as the early pilots who were attempting to break the sound barrier discovered that to pull out of a dive you pushed the stick forward not back; something akin to jumping out of a plane without a parachute! Just possibly our solution will rest with increasing interest rates rather than decreasing them. Zero interest rates in Japan have operated for decades and have realistically achieved nothing.

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There is a real sense of a gap between reality and perception. I do hope that that gap does not become too great, as I am concerned that there is simply not enough parachutes to go round.

One thing though is certain, whilst the press and the media continually focus on the ego and the individual, rather than the country or the problem, there will be no real action by governments or their (our) leaders.

Trustee's Right of Indemnity and Creditor's Right of Subrogation

By Padmini Saheb

In a recent Federal Court case of *The Bankrupt Estate of Colleen Anne Rayhill v Truthful Endeavour Pty Limited*, the Court clarifies whether the Bankrupt is a Creditor of a Trust by reason of payments by or on behalf of the Bankrupt in respect of Trust Property.

The Bankrupt had set up a Company (a Deregistered Company) bank account where by the money deposited by the Bankrupt and the money taken out of that account was money used to meet the Bankrupt's liabilities. The Bankrupt agreed, with the Trustee of a Trust which owned a property, to be liable to the Trustee for the payment of all interest and fees in respect of the Trust Property.

Consistent with that agreement, it was inferred that the Bankrupt caused the payments to be made from the Company account, on account of her own personal liabilities to the Trustee of the Trust. For this reason, the Court considered that the Company Bank Account was a convenient vehicle by which the Bankrupt dealt with money that was her own. As such, payments made from that Company bank account were not payments of the Company, they were payments from the Bankrupt. More to the point, the Bankrupt alone incurred and discharged liabilities for the Trust. The Bankrupt's liability in this regard was personal as are her associated rights against the Trust.

Accordingly, it cannot be said that the Deregistered Company was a Creditor of the Trust. The Company did not own any of the money in the Company's bank account. The Bankrupt owned the money. The Company did not make payments in relation to the Trust property, as such the Company did not accrue any rights as against the Trust, the Bankrupt did.

It follows that the Bankrupt is a Creditor of the Trust in respect of all the payments made out of the Company's bank account in relation to the Trust property. The Court ordered that the proceeds of the sale of the Trust property are subject to an equitable charge in favour of the Trustee of the Bankrupt, to secure repayment to the applicant of the debt due from the Trust to the Bankrupt.

AFSA Dec 2014 Quarter Statistics

By Joanne El-Haddad

The Australian Financial Security Authority ("AFSA") recently released the Regional Personal Insolvency Statistics for the quarter ending December 2014 ("the quarter"). The statistics identifies the regions in each state with the highest number of debtors for the quarter.

The quarter has seen NSW as the state with the highest number of personal insolvency activities totalling a number of 2,194 including cases of Bankruptcies, Debt Agreements or Personal Insolvency Agreements. The regions identified as the highest debtor activities included Wyong with approximately 3.97% of cases, Penrith with 3.33% and Mount Druitt with 3.24%. Wyong and Mount Druitt were listed with the highest number of debtors for the September 2014 quarter.

The regions in the ACT with the highest debtor activities for the quarter are Belconnen, Tuggeranong and Gungahlin. These regions total to approximately 74.07% of the total insolvency activity for the period. These regions were also identified in the September 2014 quarter as the highest related debtor activity.

A total of 1,385 personal insolvency related cases were undertaken in Victoria for the quarter and the regions with the highest debtor action were Wyndham (76 debtors), Casey-South (70 debtors) and Melton Bacchus Marsh (68 debtors). These regions only make up a small portion of the personal insolvency activities within the state.

Townsville, Ormeau-Oxenford and Mackay were listed as the highest debtor related activity regions for Queensland making up 12.09% of cases for the quarter. The three regions were also listed in the September 2014 quarter as the highest.

South Australia had a total of 437 personal insolvency activities and 29.75% were from Onkaparinga, Charles Sturt and Salisbury.

Wanneroo, Rockingham and Joondalup had a total of 145 cases of personal insolvency activities making them the highest debtor related activity regions for Western Australia. The state saw a total of 604 cases for the quarter.

Tasmania had a total of 180 personal insolvency activities and 47.22% were up by the regions Launceston, Hobart-North West and Burnie-Ulverstone.

The lowest number of personal insolvency activities for the quarter was the Northern Territory totalling to 55 cases. Palmerston, Alice Springs and Darwin Suburbs made up 70.90% of the cases.

Overall a total of 6,888 personal insolvency cases were established in the quarter which is a decrease of 7.7% in comparison with the September 2014 quarter with a total of 7,466 personal insolvency related activities. The significant decrease in the personal insolvency activities may be related to the decrease in the interest rate which allows individuals to attain funds more easily and at a comparatively cheaper rate. The decrease in the interest rate could potentially be detrimental to those who have recently borrowed funds because even a trivial increase could make a solvent individual insolvent.

Dura v Hue – Why Secured Creditors need to be viligiant when dealing with the PPSA

By Jarrad Pope

In the context of the Insolvency industry, holding security over debts is often viewed as an effective safety net against the ever-present threat of default. However, as the recent case law reveals, this assumption is coming under increasing threat, especially in the context of the recent PPSA (Personal Property Securities Act) law reform. In particular, the recent case of Dura v Hue Boutique[1] shows that the limits of the rights of secured creditors as well as the importance of prompt registration of any suspected security interests.

The above mentioned case is important for a number of reasons, most notably because it shows the situation where a security interest (as defined by Section 12(1) of the PPSA) arises from a transaction. In this case, a debtor company 'Dura', in order to secure a stay on the execution of a judgement debt (owing to the creditor 'Hue Boutique') was compelled by a court order to pay $1,000,000 into an interest bearing account in the names of the solicitors for the two parties. After the funds had been deposited, Dura was granted a loan by its parent company secured by an ALLPAAP security interest registered under the PPSA.

Dura later lost the subsequent appeal and was liable to pay Hue the original judgement debt including the $1Million placed in the supervised account. Dura was subsequently placed into liquidation creating a conflicting claim between Hue and Dura's parent company (operating through appointed receivers and managers). Hue sought an order that the Funds in the account be paid to it on an equitable basis. However, Dura's receivers resisted this request by arguing that the payment of the funds into the court-nominated account gave rise to a security interest under Section 12(1) of the PPSA. Further, since Hue had failed to 'perfect' (i.e. register on time) said security interest, it should vest in the grantor of the security interest pursuant to S267 (2) of the PPSA, and would hence flow to the parent company by virtue of their properly registered ALLPAAP security interest.

However, the Court found that whilst Hue had acquired an equitable charge over the Funds (entitled to claim if they won the appeal) a security interest had not been created and accordingly, the funds did not vest in Dura pursuant to S267 (2) of the PPSA. The Court found two overlapping grounds establishing that a security interest had not arisen; firstly that the charge acquired by Hue was established by law (and hence not a valid security interest as per section 8(1) (c) and secondly that there was no consensual transaction establishing the security interest as required by Section 12(1). This requirement of a consensual transaction requirement for security interests is a seemingly obvious prerequisite for any contract; however, it has never been tested by the courts until now.

This case raises several implications regarding the status of secured creditors particularly in respect of insolvency matters. First of all, the importance of 'perfecting' any potential security interests by registering them with the PPSR cannot be understated. Although the above case found in favour of the judgement creditor, had a security interest been found to exist, the funds in the court account would have flowed to the debtor company pursuant to S267 (2). The case is also relevant as it raises doubts over whether a security interest under the PPSA would be established in circumstances traditionally considered secured debts, such as deposits for leases of premises as well as equipment hire agreements and other similar arrangements. Particularly in regards to potentially insolvent debtors, creditors seeking to acquire security over obligations such as judgement debts should ensure that any potential security interests are duly registered with the PPSR in order to prevent the operation of S267 (2) and retain legal ownership of the security.

[1] *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd & Ors* [2014] SCA 326

Media Economic Reporting

By Ashley

The 24 hour news cycle has changed the way Australians consume their news information, websites and social media all provide an easy tool. This news cycle has placed enormous strain on journalists, in particular economic journalists. Take, for example, the large amount of profit announcements of ASX listed organisations, on any given day; as many as 30 companies could announce their profits on the same day, placing great pressure on journalists to relay the information to the reader as quickly as possible.

A simple review of Australia`s best known financial news sites during recent reporting season, showed that many journalists had clearly lifted large amounts of report information and placed them into articles and offered little analysis. For example, no research was done on the reasons that were given for one listed ASX mining organisation informing shareholders that it expected to increase profits by the end of the financial year, even though the iron ore price had continued to fall throughout the year with no end in sight and China continued to suffer from falling terms of trade. It would be understandable if the journalist came back at a later time and corrected the article or sort specific comment from the company in question to address these issues, but sadly, such a correction was lacking.

It is not just ASX news releases that have come-up short, many professional services firms have sort to release their own independent statements to market to inform but also mainly to promote themselves. Recruitment agents and Management Consultants are particularly guilty of this practice. Just last year, one of the larger recruiters released a job market "forecast" for 2015 in December, it stated that two-thirds of managers stated that they were looking to employ in the first quarter of 2015, the journalist who covered the story spoke of "employers needing to act quickly early in the year to ensure they had the best opportunity to access the best talent". At the same time the NAB business confidence survey spoke of employers taking a "wait and see" approach for 2015 and the Reserve Banks expecting unemployment to rise into mid-2015. Neither one of these two facts were mentioned by the journalist.

There is no doubt that Journalists have a changing role in this day and age, whilst there is no doubt great pressure of them to "pump out" an article they also need to balance their responsibility to the reader. Simply relying on company driven information and not old-fashioned journalistic research is simply not enough.