



Principal Chris Chamberlain B.Bus., F.C.A.
Registered Liquidator & Official Liquidator
Registered Trustee in Bankruptcy
Mobile: 0412 931 178

Partner Steven Priest B.Bus.(Acc) C.A.
Registered Liquidator
Mobile: 0427 457 416

Wagga Manager: Brett Dodson B.Bus. IPA
Mobile: 0417 691 356

Dubbo Manager: Graeme Brown IPA.
Mobile: 0488 435 265

Wangaratta Manager: Nathan Fuller B.Bus.(Acc), IPA
Mobile: 0407 255 543

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ATO Instalment Plans "The Director Risks"

Background

When a company is experiencing financial difficulties one of the first areas to be neglected is the payment of those statutory PAYG and GST obligations to the Deputy Commissioner.

As a consequence when this debt accrues to an insurmountable figure it is not uncommon for a repayment proposal to be put to the ATO and if reasonable the Deputy Commissioner will give consideration.

The risks are though that this should only be done if there are strong prospects of compliance as against just delaying quite possibly the inevitable as the latter can crystallise Director personal exposure that they are at the time unaware.

Please Explain

Section 588FA of the Corporations Act 2001 provides that any payment made or transaction entered within 6 months of the commencement of a Winding Up that provides Creditors with a higher return outside what it would receive in a Winding Up is defined as a Voidable preference.

Accordingly as in most insolvency appointments the Deputy Commissioner is a creditor and in the lead up there are invariable various instalment plan proffered and payments made which fall within the preference ambit.

Sting in the Tail

The sting in the tail though is that even though those payments are made in Good faith with no guarantees attached should a subsequent appointed Liquidator be successful in recovery from the Deputy Commissioner of Taxation those payments as a preference the Deputy Commissioner has the powers under Section 588FGA of the Act to seek recovery from the Directors of the amount disgorged.

Words of Warning

Your client need be aware of this potential exposure when requesting your assistance in proffering any instant proposal as it must be predicated on sound due prudence in prospect to serviceability etc and not just a delay tactic.

Finally as always we at Chamberlains SBR are more than welcome to discuss any matter with you or your clients regardless of how trivial it may appear.

*Chamberlains SBR, Chartered Accountants - Specialises in Personal & Corporate
Business Reconstruction & Insolvency*

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CHAMBERLAIN'S S.B.R. OFFICES –

WAGGA WAGGA
Tel 02 69 383800
Fax 02 6921 5492
DX 5427
Email admin@chamberlainssbr.com.au

DUBBO
Tel 02 6884 1077
Fax 02 6884 1072
Email graeme@Chamberlainssbr.com.au

WANGARATTA
Tel 1300 887 687
Fax 1300 798 825
Email admin@chamberlainssbr.com.au

