

Liquidators to recover sums paid to the ATO

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Director of liquidated company ordered to repay money used to reduce the tax liabilities of an associated enterprise.

Practitioners advising liquidators or directors need to be aware that directors may be personally liable under a liquidator's claim to claw back funds paid out of a solvent company prior to liquidation, even if those funds are applied to reduce the tax debt of a related company.

In *David Allan Ingram in his capacity as Liquidator of AJG Capital Pty Limited (in liq) v Donna Jean Gee* [2013] (unreported), the sole director of AJG Capital had, prior to its liquidation, paid a sum from its accounts to the Tax Office to reduce the liabilities of a related company for which she was also the sole director.

It was submitted on behalf of AJG Capital's liquidator that, in circumstances where the payment to the Tax Office had the effect of reducing that director's personal liability to the Commissioner of Taxation (in her capacity as a director of the entity on behalf of whom the payment was made), it could constitute a "direct benefit" for the purposes of s.588FDA of the *Corporations Act 2001* (Cth).

That section provides, inter alia, that a transaction of a company is an unreasonable director-related transaction (and can thus be recovered from the director) if the company makes a payment to another person on behalf of, or for the benefit of, a director of the company, and that a reasonable person in the company's circumstances would not have entered into the transaction.

The benefit must be a direct benefit to the director, and not a derivative benefit (for instance, benefiting the shareholders of another entity): *Ziade Investments Pty Limited v Welcome Homes Real Estate Pty Limited* [2006] NSWSC 457 at [89]; *Great Wall Resources Pty Limited (in liq)* [2013] NSWSC 354 and *In the matter of Lawrence Waterhouse Pty Ltd (in liq) - Shaw v Minsden Pty Ltd* [2011] NSWSC 964.

Section 588FE(6A) of the *Corporations Act* provides that a transaction of a company is voidable (and recoverable against a director) if it is an unreasonable, director-related transaction and it was entered into during the four years ending on the relation-back day (in this case, the day the originating process was filed for the winding-up of AJG Capital).

It should be noted that, unlike other voidable transactions able to be claimed by liquidators, an unreasonable director-related transaction does not need to be entered into at a time when the company is insolvent. In this case, there was no evidence of the insolvency of the company at the time the relevant payment to the Tax Office was made.

It was submitted by the plaintiff, and accepted by Rein J, that the payment to the Tax Office, even if on behalf of another company, provided a direct benefit to the common director of both entities because the effect of the payment was to reduce the amount of tax penalty which would otherwise have been payable by the director.

The *Taxation Administration Act 1953* (Cth), Schedule 1 (ss.269-1, 269-15 and 269-20) provides that a director can be personally liable for the taxation obligations of a company where the tax payable includes amounts withheld for PAYG and superannuation guarantee contributions. By making the payment to the Tax Office, the director was reducing this exposure to liability.

Correspondence of the director had indicated that the money was advanced as a loan between the two entities, which she

expected would be repaid upon the sale of a business. However, the plaintiff provided evidence to show that at the time of the relevant payment, the Commissioner of Taxation had already commenced winding-up proceedings against the entity benefited by the payment, thereby creating a real possibility of the director's personal liability to the commissioner.

In the circumstances, the director was ordered to repay the sum paid to the Tax Office, plus interest and costs.

[Back to top ^](#)