



Corporate time-bombs and the Tax man

Statutory Demands are designed to create a presumption of insolvency. If the Demand is not satisfied (usually by paying out the debt or being successfully challenged) then, once the prescribed time for compliance has expired, the Demand can be used as a basis to wind up the recipient company and have a liquidator appointed to it.

Ordinarily, where there is a dispute about a debt and certainly where there is a dispute before a court, a Statutory Demand will be set aside if the recipient company applies to the Court for that order.

To set aside a statutory demand there has to be a dispute as to the existence of the debt. The threshold in demonstrating a genuine dispute is generally not very high. If there is an arguable case then the Courts will ordinarily set aside a statutory demand.

That was the view of the Queensland Court of Appeal in the Broadbeach Properties case. In that case the company, which had received the Commissioner's Statutory Demand, had not only lodged an objection and an application for review but

had made an appeal to the Administrative Appeal Tribunal.

The Commission appealed the Queensland Court of Appeal decision to the High Court. The High Court, undertaking an analysis of the tax legislation, came to a different view from the Court of Appeal and concluded that a genuine dispute as to a tax debt does not exist simply by a company lodging an objection and / or bringing proceedings in the Administrative Appeals Tribunal (AAT) to set aside the tax ruling.

On one view of things, the High Court's decision effectively means that if the Commissioner issues a Statutory Demand against your company then, to avoid the presumption of insolvency, the Demand made by the Commissioner should be paid. Your company, if it won in the AAT, would then look to recover the tax it paid.

There is, however, a caveat to this: provided your company can prove it is solvent and, provided it can prove it has a reasonably arguable case in the Tribunal, then the Court might not grant final orders in any wind-up application.

That caveat is relatively high risk and expensive. Proving solvency usually requires an external forensic accountant to review a company's financial position with updated reports just before the hearing. It is not unheard of such evidence costing upwards of \$40,000. The strategy to be used will differ from case to case depending on the facts including the amount "owed"; the evidence of solvency and the impact the payment of the ATO claim.

Whilst the High Court's decision represents the law - it does seem to represent some challenge to the traditional view that a Statutory Demand should only be used when there is no genuine dispute as to the existence of the debt.

Nevertheless, subject to proving solvency, there appears to be no practical way of avoiding the problems raised by the decision.

The ATO has a number of protocols concerning assessments and their review. They include self imposed moratoriums on recovery proceedings being pursued before tax rulings are issued. We suggest that companies facing such issues engage their external accountants at the earliest stage.

If a Statutory Demand is received by your company keep in mind that any application to set it aside needs to be filed and served with 21 days of the Demand having been served. In addition all supporting evidence to set it aside needs to be filed within that time

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