



Tax Issues for Insolvency Practitioners

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Overview

- GST
 - who has primary GST liability
 - when can it shift to receivers and others
 - examine difficult issues
 - going concerns
 - impact of new GST rate
- New developments
 - IRD wants a better position than it currently has
- What to do when it doesn't go to plan

GST – the general rules

- GST is a tax on transactions
 - Company is generally liable for GST
 - IRD is preferred, but unsecured creditor
 - GST liability can shift
 - s58: specified agents (receivers and liquidators)
 - s5(2): mortgagees
 - "Time of supply" critical in determining who is liable
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Shifting liability to specified agents

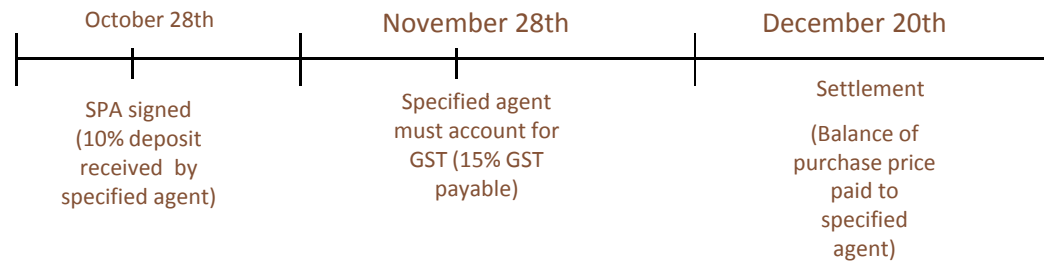
- Receivers, liquidators and personal representatives carrying on taxable activity of 'incapacitated person'
- Personally liable under section 58
- Liability does not follow cashflow
 - Can be liable even if no funds received/held
 - Converse also applies (*Rob Mitchell Builders*)

Shifting liability to mortgagees and others

- Section 5(2) directed primarily at mortgagees but has wider scope
 - goods sold "under a power exercisable by another person" in or towards the satisfaction of a debt
 - can include receivers selling assets but not otherwise carrying on taxable activity
- Exclusion exists
 - no liability if the sale would not have triggered liability for the mortgagor/vendor
- "Seller" must return and pay the GST

Tricky issues for specified agents

- Long-tailed SPAs – ensuring the deposit is sufficient to fund any GST obligation



- Cancelled contracts
 - short term GST liability often remains
- What if contract is varied?

Tricky issues for specified agents - contd

- Deposits held by "stakeholder"
- Money distributed to creditors before IRD strikes
 - going concern transactions particularly vulnerable
 - who takes the risk – creditors or specified agent?

Tricky issues for mortgagees

- Can mortgagee rely on the exclusion
 - exclusion has to be actively satisfied
 - what is required – expectation/intuition is insufficient

- When is sale 'made'
 - on execution of SPA
 - unconditional date
 - when a deposit is paid
 - settlement

Tricky issues for mortgagees - contd

- Not restricted to mortgagee sales
 - adoption of sale agreements under s179 PLA?
 - lenders who "monitor" debtors?
 - lenders who "lean on" debtors?
- Inventive solutions for mortgagees

Going concern issues for mortgagees and specified agents

- Risk remains with mortgagee/specified agent
- Usual requirements must be satisfied
 - agreement in writing
 - registered persons etc
- Whose agreement in writing is required?

Going concern issues for mortgagees and specified agents - contd

- Distressed assets have particular sensitivities
 - is there still a "going concern"
 - should mortgagor have deregistered at an earlier point
- Other problems may be present
 - sale of assets to multiple purchasers
 - sale of assets used by group of companies
 - nominations

New legislative developments

- GST rate change
 - IRD effectively getting a "super priority" for GST
 - zero-rating land
 - is it a fool-proof solution for mortgagees and specified agents?
 - Not ideal outcome for secured creditors
 - but better than other "mad" proposals
 - Effective from 1 April 2011
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Other developments of interest

- IRD wielding traditional recovery powers and investigative powers more than in the past
 - s157 recovery notices
 - s17 enquiries (pitfalls for those claiming "accountant's privilege")
 - s19 interviews
 - IRD considering using "other" powers
 - Phoenix company provisions
 - sHK 11
 - New approach to disputes – Crown Law involvement
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What to do when it goes wrong...



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