



The Honourable Bronwyn Bishop MP
Member for Mackellar
657 Pittwater Road
DEE WHY NSW 2099

Our reference:
Contact officer: Bruce Quigley
Telephone: (02) 6216 2777
Facsimile: (02) 6216 2743
Your reference:
Issue date: 17 October 2008

Dear Mrs Bishop

Request for general information- Tax Office procedures regarding communication with ASIC on deregistration of companies

At the Joint Committee of Public Accounts and Audit hearing on Friday 3 October 2008 you requested information as to whether we communicate with the Australian Securities and Investments Commission (ASIC) on companies about to be deregistered including whether we inform ASIC about possible outstanding superannuation obligations of the company.

Late last year you raised the issue of companies being deregistered while they had outstanding superannuation obligations. This means that the Tax Office was unable to issue superannuation guarantee charge (SGC) assessments or collect SGC debts without seeking reinstatement of the company through court processes.

As a result of your having raised the issue with us we have worked collaboratively with ASIC to develop strategies to address this issue. ASIC now provides the Tax Office with the same data that they provide to external collection agencies about companies that are *about* to be deregistered. This gives the Tax Office a 60 day "window" to assess the impact of the company's imminent deregistration on taxpayer compliance and take action to defer or cancel the deregistration if necessary.

Deregistration data from ASIC is now being uploaded to the Tax Office on a daily basis. This assists the Tax Office to work in real time and identify a company's deregistration much earlier than before (we used to get this data every 6 months).

We are also about to introduce a streamlined process with ASIC to facilitate the reinstatement of deregistered companies and the deferral or cancellation of a company's impending deregistration in situations where ASIC has the power to do so. This process is expected to be in place across the Tax Office by 31 October 2008.

Once these processes are fully implemented we will be able to remove a deregistered company from the Australian Business Register on or near its date of deregistration with the knowledge that taxpayer compliance will not be effected by the company's deregistration. This will also improve the integrity of the Australian Business Register and enhance its position as the government's business register

You also requested information on whether the Tax Office is able to disclose information to ASIC about a company's outstanding superannuation guarantee charge obligations for the purposes of deferring or cancelling of a company's impending deregistration in situations where ASIC has the power to do so.

As a matter of course we are unable to disclose this type of general information to ASIC due to the secrecy provisions contained in the Superannuation Guarantee legislation. However, there is an exception to these provisions that enables us to disclose information on a case by case basis. This exception allows an officer to release information that is in the performance of his or her duties.

We have internal legal advice that states that disclosure of information to ASIC will be in the course of an officer performing his or her duties and is therefore permissible where the successful raising of an assessment or recovery of a tax debt will be directly attributable to the provision of the information to ASIC. Therefore, depending on the facts of the case, we may be able to provide information to ASIC about a particular company's outstanding superannuation guarantee obligations (not the more general issue of all companies with outstanding superannuation guarantee debts). We are seeking further advice from the Australian Government Solicitor to confirm the scope of our ability to disclose information in these circumstances.

I will write to you shortly about the particular case you raised with me earlier in the week.

If you require further information, please phone me on (02) 6216 2777.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Bruce Quigley', with a long horizontal flourish extending to the right.

Bruce Quigley
Second Commissioner of Taxation

Joint Committee of Public Accounts and Audit

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

Bi-annual Hearing – 3 October 2008

Question: 1
Topic: ATO procedures regarding communication with ASIC on deregistration of companies, including whether we inform ASIC about possible outstanding super obligations of the company
Hansard Page: PA 5-7

Mrs BRONWYN BISHOP—My question is not as sexy as Liechtenstein and other places, but I think it is more relevant to ordinary battling punters and their superannuation and the pressure that a downturn in the economy is going to have. I have previously asked you a question about the relationship between the ATO and ASIC. The specific sort of problem, without going to a particular case, that is of concern to me is as follows. A taxpayer can write to the tax office and put you on notice that their employer has not paid their superannuation. The tax office does know that ASIC may deregister such companies for other reasons, but the tax office feels no obligation to notify, nor does it notify, ASIC of the fact that that superannuation has not been paid. What then transpires is that ASIC may then deregister the companies concerned. There can be a series of companies. They can be renamed and go through a whole series of name changes. The tax office, when approached further, will then say, ‘Sorry, we can’t pursue unregistered companies. Talk to ASIC.’ ASIC says, ‘Getting back unpaid super is the tax office’s problem.’ Neither organisation will take responsibility for the taxpayer who has been done out of their super. This is more likely to happen in a downturn, when more and more people are going to be pressured and that super is not going to be paid. I did ask you previously if you would look at it. I understand that you have some additional funds to do something about ASIC, but this problem has still not been addressed. There are people out there suffering because of it. I would like to ask you what you intend to do about it and whether there is a remedy that people can pursue now.

Mr D’Ascenzo—I welcome that insight about areas of concern. I share your concern about those sorts of outcomes. I am not sure what our legal position is on being able to provide that information to ASIC. But what to do from here is to first find out whether or not I can do more in that area under the law.

Mrs BRONWYN BISHOP—I have seen correspondence that the ATO has written saying: ‘Sorry. Can’t do anything.’ ASIC’s correspondence said, ‘Talk to the tax office.’ Neither organisation wants to take responsibility.

Mr D’Ascenzo—That is not because of not wanting to do anything. It may be that we are constrained by the law in terms of what we can do.

Mrs BRONWYN BISHOP—Indeed. I accept that. But the problem with that is that I know you have been on notice with such a problem since 2003. I know that I personally brought it to the attention of the tax office at a previous hearing. Here we are in 2008 and I still hear from people who are suffering because they do not get their super. As a legislator thought I was legislating to assist them, but they are not getting any assistance and they are being done out of their dough.

Mr D'Ascenzo—I understand fully what our legal position is. If the legal position is such that I cannot do anything further, I will make sure that it is put on the table for others. Treasury and government—

CHAIR—*You are happy to get back to us formally on that answer?*

Mr D'Ascenzo—*Yes.*

Mrs BRONWYN BISHOP—If I can really make the point: the problem with that is that this was raised previously and nothing has happened. Is that what you are telling me?

Mr D'Ascenzo—I am not sure that is the case. I am sure that any of the issues that you and others on the committee have raised would have been considered. I am just not sure of precisely what we have done in terms of who we referred the matter to. I suspect that there are some legal issues associated with our provision of information, in those circumstances, to ASIC and I suspect that that information has been passed on to the appropriate policy people, but I do not know; I cannot guarantee that.

CHAIR—We are going to move from that—

Mrs BRONWYN BISHOP—I understand that you want to move on, but, Mr Commissioner, may I have a contact point where I may discuss this further with somebody, because it is important?

Mr D'Ascenzo—The second commissioner in charge of law will be happy to do that. I might add that there are some high-profile cases where we have taken the action of trying to reinstate the company after ASIC has—

Mrs BRONWYN BISHOP—The letter that came said: 'You may wish to try and get us to reinstate the company, but it is all a bit difficult. Look at the website.' I do not think that is fair for an ordinary, battling punter.

Mr Quigley—We have certain cases where we have, as the commissioner mentioned, attempted to reinstate the company to actually be able to get those sorts of debts, but I am more than happy to—

CHAIR—We cannot pursue individual cases, but certainly there is a principle that needs to be clarified.

Australian Taxation Office response:

Mr Bruce Quigley, Second Commissioner Law, spoke to Mrs Bishop on this matter following the JCPAA hearing and provided a letter on 17 October 2008 outlining Tax Office procedures regarding communication with the Australian Securities and Investments Commission (ASIC) on the deregulation of companies.

A copy of this letter is attached.

The final advice referred to in Mr Quigley's letter to Mrs Bishop was received from the Australian Government Solicitor on 8 January 2009. Broadly, the advice stated:

- Information collected for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (SG Act) can only be disclosed outside of the Tax Office where the disclosure is consistent with the secrecy provision found in section 45 of the SG Act.

- Subsection 45(2A) will permit a disclosure of information to ASIC where the Commissioner is able to show that he made the disclosure as part of a bona fide attempt to administer the SG Act. For example:
 - The disclosure is in the course of activities which are directly referable to the assessment and/or collection of SG charge.
 - The disclosure is for the purpose of maximising the likelihood of a company's superannuation guarantee charge liability being enforced and the resultant revenue being collected.
- Specifically, subsection 45(2A) will permit the Commissioner to disclose information concerning a company's outstanding superannuation guarantee obligations to ASIC where the Commissioner is aware that ASIC intends to deregister that company, and deferring deregistration will assist in the assessment and/or collection of superannuation guarantee charge.
- If the Commissioner cannot demonstrate that the disclosure is for the genuine purpose of facilitating the assessment and/or collection of superannuation guarantee charge, information should not be disclosed. For example:
 - Where the Commissioner is aware there is no genuine liability to superannuation guarantee charge.
 - Where the Commissioner is aware, or can easily demonstrate that deferral or cancellation would not increase the amount of the debt collected – for example, where the Commissioner has information confirming that there are no assets from which any debt could be satisfied.
 - Where no decision has been made to undertake compliance activities in relation to a company. In such cases the SG Act is not being administered so the disclosures could not be in any real sense for the administration of that Act.