THE TAX INSTITUTE

THE MARK OF EXPERTISE

25 July 2014

Mr Ali Noroozi
Inspector-General of Taxation
Level 19
50 Bridge Street
SYDNEY NSW 2000

By email: debt@igt.gov.au

Dear Ali,

Review into the ATO's approach to debt collection

Thank you for the opportunity to make this submission in relation to your review of the ATO's approach to debt collection.

We consider that the ATO's processes in the area of debt collection could be improved. The most powerful evidence of this is the number of times our members complain to us about ATO debt collection activity.

In accordance with your Terms of Reference dated 26 May 2014, the appendices to our submission set out our members' experiences with the ATO in this area by way of examples. The overarching themes from these examples are set out below.

Early recovery

Members have provided us with details of their concerns about current ATO debt collection strategies, particularly in relation to the activities of third party debt collection agencies who are employed by the ATO to assist with debt collections. We have included in **Appendix A** several examples of the concerns which have been expressed to us by members.

An underlying cause of the concerns we see is a lack of real time access to relevant information by the debt collection area within the ATO or the third party debt collector regarding the debt outstanding and the relevant client contact.

In each case, there has been a failure to provide correct information to the person seeking recovery. As you can read in Appendix A, our members have been:

- contacted after hours;
- contacted about someone long since a client
- contacted by someone who does not sufficiently understand his role to enable him to provide assurance to our member that it was in order to discuss client details;
- contacted before the due date, seeking recovery of a debt;
- contacted before the due date for a return, alleging default in lodgement; and
- trying to make payment arrangements, only to be thwarted by red-tape.

Our members, many of whom are working in small and medium sized businesses, find it difficult to recover recompense for these wasteful interactions.

Firmer action

Appendix B contains detailed examples of our members' dealings with the firmer action section within the ATO.

A key theme in these examples is the fragmentation of the ATO's administration of the affairs of a single taxpayer. Interactions with the firmer action section could result in the taxpayer having to deal with numerous ATO officers who are not adequately briefed with the relevant facts.

Court proceedings

Appendix C contains detailed examples of ATO conduct in winding up proceedings and in enforcing director penalty notices.

Winding up proceedings

Our members have expressed a concern that, on those occasions when the ATO instructs external solicitors in debt collection proceedings, delays and inefficiencies are caused by the solicitors' having to obtain detailed instructions in the conduct of the proceedings, and the inability to obtain those instructions from the ATO in a timely fashion.

Director Penalty Notices (DPNs)

Our members have a perception that DPNs are issued, and court action instituted, automatically, without close supervision by ATO officers. Not only have safeguards for non-service of demands been removed (s.269-25(4) of Schedule 1, *Taxation Administration Act*), but the scope of thedebts subject to the measures has been

expanded to include Superannuation Guarantee Charges. This is therefore an area requiring vigilance.

With the apparent increase in the use of DPNs, there is the need to broaden the Commissioner's power to release liabilities, for hardship under Division 340 *Taxation Administration Act*. The statutory defences to DPN liability are drawn narrowly: s.269-35 *Taxation Administration Act*. The statutory defences do not accommodate true cases of hardship arising in unusual situations. An example is a professional person, who volunteers to sit on a charity board, but unknowingly is exposed to a risk of penalty. Whilst one could conduct a court trial onthe application of the strict defences in such a case, the Commissioner might be better armed under Division 340 to avoid that problem, for example in unusual circumstances.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours sincerely

Michael Flynn
President

Appendix A – Examples of the ATO's use of third party debt collectors and early recovery section

Example A.1

A member has expressed concern at receiving a call on 5 February 2014 from the "Recovery Collections" area for a $700 debt not due until 21 March 2014.

Example A.2

A member was trying to make a payment arrangement for a client for a debt of less than $10,000 using the ATO's automated self-help service which concluded that the payment arrangement could not be arranged through this system. The member was referred to an ATO officer who advised they couldn't deal with the payment arrangement because the matter was being handled by a debt collection agency. Upon speaking with the debt collection agency, the agency couldn't assist because the debt figure had not yet been updated for a recent BAS amount. The member noted that they had to wait for a letter to be issued by the debt collection agency before they could enter into the payment arrangement.

Example A.3

A member was concerned at being addressed as "mate" by an officer at a debt collection agency after providing his details as required by ordinary "proof of identification" procedures. The member was also concerned with what legal obligation an agent has to provide the debt collection agency with details about a particular client in the absence of receiving authority from the client to do so. As the debt collection agency officer could not advise the member, their discussion had to end at this point.

Example A.4

A member expressed concern at being contacted by an officer from a debt collection agency after hours who also asked to speak to the client directly rather than the tax agent whom they had contacted.

Example A.5

A member expressed concern at receiving correspondence from the debt collection agency when they were no longer the tax agent for the client having previously advised the ATO of this.

Example A.6

Receipt of a letter by a member from a debt collection agency to whom the client's "case" had been escalated due to non-lodgement. The member advised the client had no tax currently owing, no debt outstanding and was due a significant refund.

Example A.7

Receipt of a telephone call by a member from an officer of a debt collection agency chasing up a debt of $320 of a taxpayer who had not been a client of the member for 15 years and was then advised by the officer of the debt collection agency to change the details of the taxpayer with the ATO.

Example A.8

A member received client debt demand letters from a third party debt collector with the TFNs listed but no client names. The ATO responded to this concern noting that this was due to a system error arising during a weekly data transfer between the ATO and the third party debt collector. The ATO informed the debt collector of the system error on the same day however the debt collector had already issued the letter.

Example A.9

A member received a telephone call from an officer of a debt collection agency outside business hours in relation to an ex-client.

Example A.10

A member received a telephone call from an officer from the "Early Collections" area requesting an urgent call back in relation to an ex-client from 8 years ago, who was not under the member's current Tax Agent Number. The member was asked for the client's TFN (for proof of identity purposes) and then asked to update the client record even after explaining that the taxpayer was no longer a client.

Example A.11

A member received a telephone call from an officer from the "Early Collections" area stating that a client had defaulted by failing to lodge its March 2014 BAS. The member explained that the lodgement was due on 26 May 2014 and an extension of time was sought on that date to 30 May 2014. The officer asked the member if the application had been approved. The amount payable on the BAS was $300.

Appendix B – Examples of the ATO's use of firmer action section

Example B.1

This matter is an example of interactions for a significant debt with the Australian Taxation Office (**ATO**) Firmer Action Call Centre.

Facts

This Taxpayer was issued a creditors' statutory demand for payment of debt on 2 June 2014, for an amount of $848,381.70 – notwithstanding the ATO had not responded to all correspondence by the Taxpayer's tax agent regarding entering into an appropriate payment arrangement.

Interactions with ATO debt management on this matter commenced in June 2014 and are ongoing.

The Taxpayer provides support services to large mining corporations, including the leasing of mining trucks, equipment etc. With the downturn in the mining boom, the Taxpayer's fleet was not fully hired, yet the Taxpayer still incurred significant holding costs regarding the fleet – resulting in significant losses.

The Taxpayer took appropriate action to address the situation. Its business model has changed so that it now earns commissions from connecting sellers of equipment with interested purchasers and it no longer leases and on-hires equipment. Staff numbers have reduced from 14 to three personnel.

The ATO had entered into a payment arrangement, but the Taxpayer defaulted and attempts to successfully re-negotiate a payment arrangement were unsuccessful (despite the Taxpayer continuing to keep up with current lodgment obligations). The ATO issued a statutory demand, which prompted the Taxpayer to seek legal representation from a member.

Concerns

The matter may be an example of:

- The efficiency of the structure and design of the ATO's debt recovery and assistance initiatives – particularly the efficiency of the ATO Firmer Action Call Centre (Item 2 of your terms of reference).

- The proportionality, consistency and effectiveness of the ATO's debt recovery activities, including its use of creditor statutory demand notices (Item 3 of your terms of reference).

- The appropriateness and consistency of assistance that the ATO offers taxpayers including by way of payment arrangements (item 4(a) of your terms of reference).

The member's fax dated 26 June 2014 (**Attachment B.1.1**) provides reasonable detail regarding our concerns regarding the failure of the ATO's firmer action call centre to manage the collection of outstanding debts in the most cost efficient manner – to both the ATO and Taxpayer.

The ATO response dated 2 July 2014 (**Attachment B.1.2**) provides the ATO's views on why it seems to regard those concerns as unjustified. In responding, the ATO has misconstrued the request that a single ATO officer be allocated to handle payment arrangement negotiations. Rather the ATO has responded that it would be impractical to assign a single officer to handle all interactions between the ATO and a particular taxpayer. The response is generic and fails to explain why correspondence on behalf of the Taxpayer remains unanswered, or why the ATO has proceeded with issuing a statutory demand notwithstanding the Taxpayer and its representatives were still taking action to negotiate an appropriate payment plan.

Recommendations

Allocated officers

The ATO should allocate specific officers within the debt collection area to specific Taxpayers (particularly those with any sizeable debt – for instance above $250,000), to ensure the following objectives:

- All information provided to the ATO is appropriately captured and considered – for example, in this Taxpayer's instance, an allocated officer could monitor current lodgment activities and perhaps internally identified the ATO systems allocating the current GST refund to historic debts, without first offsetting current PAYG obligations and therefore realised the Taxpayer is keeping up to date with current obligations.

- To minimise costs and inefficiencies – to the ATO, Taxpayers and their representatives – relating to the need to re-explaining previous advice/submissions and to reduce the time required by the Taxpayer and their representatives being placed on hold in queues to speak to members of the Call Centre Team.

No allocated officers

If the ATO do not wish to allocate officers to particular cases, even where the debts are significant, then:

- Prior to instigating more formal recovery action (for instance issuing formal statutory demands with a view to winding up taxpayer entities), the ATO should ensure its systems which are relied on as trigger points correctly reflect the Taxpayer's position. For instance, if the trigger point for taking more formal action is a Taxpayer's failure to pay current liabilities, then prior to implementing the action, officers should perform crosschecks to ensure the ATO systems

accurately reflect the Taxpayer's lodgment and payment position of current obligations.

- ATO systems need to be improved to ensure all relevant information is captured – relevant to the Taxpayer's circumstances such as changes in business models.

Improved training

Irrespective of whether ATO debt management officers are allocated to specific cases, the officers need to have a greater **commercial** understanding of the business environment. For instance ATO officers need to appreciate financial statements are historic data and balance sheets reflect a financial position at a particular point in time. To properly understand prospects of a Taxpayer's ability to repay outstanding debt focus needs to be on cashflow forecasts, management's reactions to address loss making activities, economic forecasts for particular industries etc.

Attachment B.1.1 – Fax from Member to ATO dated 26 June 2014

26 June 2014

Leisa Kelly and Nadeem Siddiqi Firmer Action Call Centre Australian Taxation Office

Fax 1300 724 793

No. of pages: 12

Dear Leisa and Nadeem

Request for payment arrangement

Notice of appointment

1 Further to recent discussions with Leisa, please find **attached** a copy of a nomination of a legal representative form regarding our representation of (**Taxpayer**) in its dealings with the Australian Taxation Office (**ATO**).

Request for case officer to be allocated to case

2 I am concerned that to date, the Taxpayer's requests for a payment arrangement have not been properly considered in accordance with the principles contained in:

(a) Practice Statement Law Administration PS LA 2011/14 (**PS LA 2011/14**) regarding general debt collection powers and principles to be followed by the Commissioner of Taxation, which requires the Commissioner to consider the individual circumstances of each case (paragraph 55 PS LA 2011/14); and

(b) Practice Statement Law Administration PS LA 2011/4 (**PS LA 2011/4**) regarding the recovery of disputed debts.

Lack of familiarity with Taxpayer's relevant circumstances

3 For instance, yesterday when speaking to Leisa she indicated that the Taxpayer had not paid its March obligations and that this somehow 'proved' the Taxpayer did not have the capacity or interest to continue paying down the debts to the ATO. This statement is incorrect and fails to consider the individual circumstances of the Taxpayer – as required by PS LA 2011/14.

4 **Attached** is a copy of the Taxpayer's March business activity statement (**BAS**) (on ATO letterhead) indicating that the net GST refund was $23,561. This refund amount was **after** payment of all liabilities for the period including the income tax withholding (**ITW**) obligation of $16,613.

5 From speaking to Leisa and John Lynn, it seems the ATO systems have and are incorrectly reporting the $16,613 as being unpaid. The BAS printout from the ATO portal evidences the Taxpayer's net position for the quarter was a refund of $23,561 and therefore there should be no outstanding obligations for this period. If ATO systems have applied the full GST refund amount of $40,174 to historic debt, without offsetting the current period ITW liabilities in the first instance, then this is an issue for the ATO and the Taxpayer should not be prejudiced in negotiating a payment arrangement with the ATO.

6 If a case officer had been allocated to the matter (which involves a debt in excess of $800,000) then it is likely the issue would have been identified more efficiently and the Taxpayer's individual circumstances would have more properly been taken into account in accordance with ATO rulings.

7 When speaking to Leisa on 24 June 2014, Leisa noted the most recent obligations had not been paid earlier this week. This is because the Taxpayer has shed all staff other than three, and the staff member responsible for lodging and paying activity statements was sick and unable to attend work. These obligations have now been lodged and paid.

Unanswered correspondence

8 I also note that on 2 June 2014 the Taxpayer's tax agent advised the ATO that the Taxpayer's circumstances had changed and that the ATO defer any recovery action so that an appropriate payment proposal could be adjusted as needed. To date the ATO has not responded to this correspondence outlining a change in the Taxpayer's circumstances, notwithstanding three weeks has lapsed. An allocated case officer would help ensure the Taxpayer is treated in accordance with their rights under the Taxpayers' Charter.

Allocation of specific officer in accordance with Taxpayers Charter

9 Accordingly, to ensure the ATO honours the Taxpayer's rights under the Taxpayers Charter and to ensure the ATO acts in accordance with the principles contained in PS LA 2011/14 and PS LA 2011/4 I ask that you confirm an officer will be allocated to the case and provide appropriate contact details of that particular officer for all future correspondence to be addressed to. The telephone number Leisa Kelly provided to me on 24 June (02 9354 6605) does not connect.

Payment proposal

10 The Taxpayer wishes to propose a payment arrangement whereby:

(a) an upfront payment of $50,000 is made;

(b) monthly instalments of $30,000/month for the 12 month period July 2014 – June 2015;

(c) additional repayments to be made during 12 month period as cashflow permits; and

(d) any remaining balance (if any, which the Taxpayer regards as unlikely) to be re-negotiated at that point in time.

Relevant ATO commentary to be considered

11 In making your decision, I request you have particular regard to the following ATO commentary, having regard to the Taxpayer's circumstances.

Individual circumstances of Taxpayer

12 Paragraph 55 PS LA 2011/14, which requires the Commissioner to consider the individual circumstances of each case, which regarding the Taxpayer includes:

(a) The Taxpayer's business is a family business which has been in existence in one form or another for more than 40 years.

(b) It is only due to the current down turn in the mining industry that the Taxpayer has found itself in financial difficulties, however it has managed to address these difficulties and merely needs time to repay the ATO debt.

(c) To address the financial difficulties, the Taxpayer's business model has changed significantly (as referred to in the 2 June 2014 correspondence), which means past financial statements and cashflows previously provided are no longer relevant data.

(d) Key changes to the Taxpayer's business model include:

(i) Reducing staff numbers (and associated costs) from 14 staff to just three staff – all of which have significant experience in the industry.

(ii) Selling its hire fleet of mining equipment as they only had four machines on hire out of 19 and the repayments were significantly higher than revenue generated from the leased equipment.

(iii) Selling any other business assets – including scaling down the number of yards, workshops, offices used in the business.

(iv) Restructuring the business to focus on purely sales and cross hire for mining equipment where the Taxpayer no longer buys equipment, but instead puts a margin on the cross hire.

(e) The Taxpayer is now a debt free company with no loans (other than the amounts owing to the ATO).

(f) The Taxpayer has approached its financiers and others to try and secure funding to pay this outstanding amount to the ATO; but financiers are reluctant to lend to the Taxpayer's industry at the moment, which means it is unable to secure alternative funding.

(g) The Taxpayer uses a facility in place with ANZ which works by loaning funds for a particular deal and must be paid back when the deal is concluded.

(h) Due to the new nature of the business, the Taxpayer cannot commit to large payments each month to the ATO, as it no longer has the benefit of regular monthly hire income.

(i) The new nature of the business however means that significant commissions (up to $250,000) can be earned in one or two month periods from the sourcing of just four pieces of equipment. Such commissions, although irregular, are expected to enable the Taxpayer to repay the debt in full within 12 months (by making additional payments over and above the $30,000 per month payments proposed as part of the payment plan). This proposed action is consistent with the Commissioner's expectations as stated in paragraph 64 PS LA 2011/14, which states debts must be paid in the shortest possible time frame.

(j) The Taxpayer has been verbally advised they are one of two companies that have been shortlisted to supply equipment to the . This contract, if successful, is expected to net the Taxpayer $400,000 per month for the next five years.

Inability to pay

13 Paragraph 10 PS LA 2011/14, which requires the Commissioner to consider the factors or circumstances which have led to the inability to pay. On this point we note the debt has arisen during the most significant down turn in the industry in 40 years. The Taxpayer has taken appropriate steps to mitigate future losses and merely needs time to generate sufficient income to allow the ATO debt to be paid in full.

Costs and benefits of pursuing alternative collection activity

14 Paragraph 64 PS LA 2011/14 requires the Commissioner to consider the costs of alternative collection activity. In this instance, as the ATO has already issued a statutory demand, it seems the alternative collection activity is the continuance of legal proceedings.

15 Any estimates of the likely costs of any alternative collection activity should take into account:

(a) the costs (in terms of ATO resources) required to pursue enforcement of the statutory demand;

(b) the likelihood that enforcing the statutory demand is likely to result in the Taxpayer entity being wound up, without the ATO debt being paid in full.

16 These costs do not seem justified when the Taxpayer is willing to enter into a 12 month instalment arrangement whereby $30,000/month will be paid to the ATO and it is expected additional payments will be made during this period (as significant commissions are earnt) to pay out the debt in full.

17 **It is our view that the likely costs of alternative collection activity will outweigh any benefit the ATO is likely to obtain by continuing such action and that it is more likely the ATO will have its current debt repaid in full, in a more efficient manner (in terms of both cost and time) if the ATO were to grant a 12 month payment plan.**

18 We note paragraph 63 PS LA 2011/14 acknowledges instalment arrangements can be granted beyond one, two or more financial years. Whilst at this stage the Taxpayer is

only requesting an instalment arrangement over a 12 month period, it would be possible for the ATO to consider a longer instalment period to cover a larger portion of the debt if necessary, if the ATO is not comfortable the Taxpayer will be able to pay a significant portion of the debt in additional payments in the proposed 12 month period.

Consideration of particular merits on a case by case basis, without bias and in good faith

19 Paragraph 15 PS LA 2011/14 and paragraph 6 PS LA 2011/4, both of which require:

(a) each case to be considered on its particular merits; and

(b) case officers to exercise their own judgment in arriving at an appropriate decision, which must be made in good faith and without bias.

20 Having regard to the likelihood of the Taxpayer being able to repay the debt in full in the coming 12 months, particularly given it is one of two entities shortlisted for a contract with the Wilkie Creek Coal Mine expected to net $400,000 per month, it seems the costs of alternative collection activity (pursuing legal proceedings) are not warranted, given if the Taxpayer entity is wound up prior to given a chance to generate future cash inflows then there are few assets remaining which can be sold to satisfy the outstanding tax debts. Rather, there is greater likelihood of the ATO debt being paid in full if the ATO agrees to enter into a further payment arrangement with the Taxpayer.

21 Please advise what further information, if any, you require to make a decision. The accountant had been waiting on a response from the ATO regarding her 2 June 2014 correspondence before preparing revised cashflow forecasts. I also reiterate that the financial data in the possession of the ATO regarding the Taxpayer (including financial statements) is no longer as relevant given the significant changes to the Taxpayer's business model as outlined above.

Attachment B.1.2 – Response from ATO to Member dated 2 July 2014

PO Box 1129 Penrith NSW 2740

Australian Government
Australian Taxation Office

GPO Box
BRISBANE QLD 4001

Our reference: Service Delivery/Debt
Contact officer: Debt Collection Officer
Phone: 1300 303 570
Fax: 1300 139 045
ABN: 20 069 213 556
Your Reference:

2 July 2014

Dear Sir/Madam

We refer to our telephone conversation on 1 July 2014 and to your specific concerns regarding the allocation of a case manager to your c!!ents' file and recovery of the outstanding debt.

Request for Case Manager
We confirm that that the ATO is unable to provide you with one specific case officer to manage the taxation affairs of the above entity. The Commissioner of Taxation exercises a right to delegate his functions to specified ATO employees. The delegations are specific to the employee's role within the ATO in the administration of tax laws.

Given the diverse nature of taxpayers' affairs it is impracticable for the Commissioner to assign a single ATO employee to manage a taxpayer's past, present and future interactions with the ATO. Therefore various ATO officers will be required to action your client's case depending on the circumstances.

Taxpayers' are treated in accordance with the Taxpayer Charter and the principles contained in the Law Administration Practice Statements. Your client's queries and taxation affairs have been and will continue to be dealt with in a manner that is consistent with these policies.

Payment Proposal
We confirm that your payment proposal of 26 June 2014 is currently under consideration and a formal response will be issued in due course.

Further recovery action will be deferred pending finalisation of this correspondence.

For more information
If you have any questions, please phone **1300 303 570** between 8.00am and 6.00pm.

What you need when you phone us
We need to know we're talking to the right person before we can discuss your tax affairs. We'll ask for details only you or someone you've authorised would know. An authorised person is someone who you've previously told us can act on your behalf. If you can, please have your tax file number or Australian business number with you.

Yours faithfully

Robert Ravanello
Deputy Commissioner of Taxation

Example B.2

The matter is an example of interactions for a significant debt (in excess of $4 million) with the Australian Taxation Office (**ATO**) Firmer Action group in circumstances where the Taxpayers subsequently entered into a settlement with the ATO. In particular the matter is an example of ATO communications between debt management divisions and legal divisions prior to a settlement (to settle a contentious application of the law) with Taxpayers is finalised.

Facts

Interactions with ATO debt management on this matter occurred between June and November 2012.

The Taxpayers owned land jointly and were partners to a partnership, which was to develop a portion of the land. For various reasons it was intended that each Taxpayer have rights to undertake other developments on the land each in their own right – essentially as each partner wanted sole control/ownership of certain apartment complexes to be built on the land.

In issuing assessments, the ATO regarded only the partnership as having conducted an enterprise. Further, in finalising the audit the ATO:

- only issued increasing assessments (to the partnership) and did not issue assessments to the partners refunding significant GST previously paid; and
- denied claims for input tax credits on creditable acquisitions;
- attempted to issue assessments (for some $2.4 million) for GST outside relevant time periods.

Whilst the ATO ultimately settled the legal dispute, the Taxpayers and their representatives still needed to go through the process of dealing with the Firmer Actions Debt Management group.

Sufficient additional background is provided in the copy of the member's correspondence dated 15 June 2012 (**Attachment B.2.1**).

Concerns

The matter may be an example of:

- The efficiency of the structure and design of the ATO's debt recovery and assistance initiatives (Item 2 of your terms of reference).
- The appropriateness and consistency of assistance that the ATO offers taxpayers including by way of decisions not to pursue tax debts (Item 4(d) of your terms of reference).

The ATO does not have effective systems in place to deal with payment arrangements regarding highly contentious assessments – particularly those possibly issued out of time or in instances where the ATO auditors have issued only increasing, but not decreasing assessments – thereby overstating debts owed (between a small group of taxpayers) to the ATO.

Recommendations

Improved systems

For matters where there is a real risk the debt is over stated (for instance it is apparent the ATO has issued debit assessments to more than one taxpayer for tax on the same underlying amounts), the ATO should have in place systems for this to be efficiently reviewed to ensure the relevant taxpayers are not put to unnecessary costs.

Appropriate systems need to be in place between ATO debt management teams and ATO officers contemplating possible settlements to minimise unnecessary costs on taxpayers having to explain the position to multiple ATO officers/teams.

Attachment B.2.1 – Letter from Member to ATO dated 15 June 2012

15 June 2012

Attention: Anna Cooper
Firmer Action, Townsville
C/- Australian Taxation Office
Level 1, 140 Elizabeth Street
BRISBANE QLD 4000

Email Anna-Marie.Cooper@ato.gov.au

Dear Ms Cooper

Deferral of ATO collection activity

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1 We act for the partnership of

2 Recently the Australian Taxation Office (**ATO**) has finalised an audit of the Taxpayer, concluding that certain development activities were conducted in the name of the Taxpayer, and not in the capacity of related entities in their own right (who had been remitting GST on their activities).

3 Relevant assessments (**Assessments**) include:

Assessment	Period	Amount
GST – reduced activity statement credit	ending 30 June 2009	$433,611.00
GST – additional activity statement liability	ending 31 December 2008	$2,467,790.00
Administrative penalty	ending 30 June 2009	$216,805.50
Administrative penalty	ending 31 December 2008	$1,233,895.00
Less: GST – increased activity statement credits	various periods	$(178,635)
TOTAL		**$4,173,466**

Objections

4 Our firm has been instructed to draft objections and liaise with the ATO regarding an appropriate payment arrangement.

5 The assessments are based on an interpretation of the facts by the ATO which differs from and is not accepted by the Taxpayer. The ATO has raised large assessments for a transaction which the Taxpayer maintains did not occur in the manner claimed by the ATO.

6 The Taxpayer will provide further evidence to further support its interpretation of the facts in the consideration of the objections, given the ATO auditors have chosen to disregard

valid evidence supporting that the parties to the Taxpayer partnership did not intend to carry out all activities in partnership.

7 Those objections will be based on a number of technical grounds, including that the assessments are 'out of time' (discussed further below) so that no amounts are validly payable.

Deferral of recovery action

8 We request that the Commissioner defer any recovery action given the principles contained in:

(a) Practice Statement Law Administration PS LA 2011/14 (**PS LA 2011/14**) regarding general debt collection powers and principles to be followed by the Commissioner of Taxation, which requires the Commissioner to consider the individual circumstances of each case, as outlined below (paragraph 55 PS LA 2011/14); and

(b) Practice Statement Law Administration PS LA 2011/4 (**PS LA 2011/4**) regarding the recovery of disputed debts.

Commissioner's approach to entering payment arrangements

9 Annexure B to **PS LA 2011/14** details the Commissioner's approach to deferring collection action on debts.

Quantum of debt

10 In considering deferred ATO collection action, we wish to note that the size of the debt is likely to be significantly reduced, even if objections to the Assessments are unsuccessful.

11 This is because significant GST has already been assessed and remitted by other related entities on what are the same underlying transactions - now transferred by the ATO under its assessments to the Taxpayer.

GST remitted on building fees

12 Specifically, we note that the quantum of overall GST owing to the ATO under the Assessments is significantly overstated due to the same auditors responsible for issuing the Assessments having simultaneously finalised the audit of (a partner of the Taxpayer), on the basis that no Assessments were required to be raised, but where this entity has remitted in excess of $1.6 million in GST on the basis it made taxable supplies in its own right.

13 The auditors formed the view that the activities generating these taxable supplies were instead conducted by the Taxpayer, on which basis the Taxpayer has been assessed additional tax and has been denied an input tax credit of $433,611 – but the auditors have chosen not to make the corresponding adjustment to reduce the $1.6 million GST paid by .

14 By way of further background, was party to certain development agreements, under which it charged GST on building services it provided to other entities, including the Taxpayer.

15 In concluding the audit of the Taxpayer, the ATO is asserting that all of these development activities were undertaken by the Taxpayer partnership, and not in its own right. On this basis, the ATO has denied the input tax credit of $433,611 claimed by the Taxpayer.

16 had remitted GST, including the $433,611 for this period, on building fees invoiced to the following taxpayers:

Taxpayer	Building fee	GST charged/ remitted	Whether claimed by recipient
	$4,336,112.18	$433,611	claim denied under current audit
	8,332,137.13	$833,214	never claimed, as developed units were used for input taxed purposes
	3,911,003.14	391,100	by ATO audit this claim had already been reversed (we consider incorrectly)
		$1,657,925	

Time limits on recovery of indirect tax debts

17 Section 105-50(1) Schedule 1 Taxation Administration Act states that any unpaid net amount of indirect tax (including GST) ceases to be payable four years after it became payable by the Taxpayer.

18 The Assessment for GST payable (of some $2.4 million), incorrectly attributes the GST to the December 2008 quarter, based on the ATO's interpretation of the facts ignoring any non-monetary consideration received by the Taxpayer in respect of the subject land supply.

19 The Taxpayer will demonstrate that, on the facts including by further evidence, all or most of the GST relating to the subject supply must (even under GSTR 2000/29) be attributed to periods up to March 2008 – so that all or most of the GST assessed is 'out of time'.

20 In considering deferring ATO collection action, consideration should be given to the fact that the entire claimed GST payable is subject to significant doubt, on the above basis, because of factual issues – and that the ATO auditors' conclusions will be fully disputed based on further evidence.

Conclusion

Accordingly, we request the ATO to confirm that it will defer collection action until the objections, which will be lodged as soon as possible, are finally determined.

Example B.3

This matter is an example of where taxpayer's affairs apparently merited the attention of 5 of the ATO's offices, but not the office nearest the taxpayer's registered office. The facts of the matter are on the public record as *Deputy Commissioner of Taxation v ABW Design & Construction Pty Ltd* (2012) 203 FCR 70 (**Attachment B.3.1**). We refer in particular to passage from the judgment of Logan J at para 14-16:

The evidence establishes that, at the time of posting, the Mt Gravatt address which Mrs Kostolanji wrote on the envelope was the registered office of ABW. As registered in the records of the Australian Securities and Investments Commission (ASIC), the address of that registered office includes the post code 4122.

Given the location of ABW's registered office, it may perhaps be a source of surprise to the reader that the making of the statutory demand was effected by an officer of the Australian Taxation Office stationed in Townsville in North Queensland. That surprise may be tinged with a note of irony by the following.

It was common ground in this case, that, amongst the many other offices throughout Australia which the Commissioner maintains, there is an office of the Australian Taxation Office at Logan Road, Upper Mt Gravatt, on the opposite side of that road and about 1 km away from ABW's registered office. Other features at the evidence in this case were that the affidavit in support of the originating process was deposed to by another officer of the Australian Taxation Office, on this occasion stationed at the Commissioner's office at 140 Elizabeth Street, Brisbane. The audit which underpinned the various taxation debts comprising the "running balance account deficit debt" was apparently conducted by an officer of the Australian Taxation Office based in Penrith, New South Wales. The Australian Taxation Office advice (dated 28 October 2010) to ABW of the completion of that audit specified yet another address of the Australian Taxation Office, an address at Albury, New South Wales, as the address to which to request the remission of any interest charge associated with the taxation debts which were raised. A yet further Australian Taxation Office address was specified in that letter as the address to send any objection in respect of the assessments raised. That address was in Sydney, New South Wales. Though it was but a short walk away from ABW's registered office, the Commissioner's Upper Mount Gravatt office appears not to have been assigned any role either in relation to service of the statutory demand, audit or otherwise.

Attachment B.3.1 - *Deputy Commissioner of Taxation v ABW Design & Construction Pty Ltd* (2012) 203 FCR 70

FEDERAL COURT OF AUSTRALIA

Deputy Commissioner of Taxation v ABW Design & Construction Pty Ltd

[2012] FCA 346

Logan J

17 February, 8 March, 4 April 2012

Corporations — Service of documents — By post to registered office — Address on envelope to include postcode if included in ASIC records — Corporations Act 2001 (Cth), s 109X — Acts Interpretation Act 1901 (Cth), ss 28A, 29.

Practice and Procedure — Service — On a corporation — By post to registered office — Address on envelope to include postcode if included in ASIC records — Corporations Act 2001 (Cth), s 109X — Acts Interpretation Act 1901 (Cth), ss 28A, 29.

Practice and Procedure — Service — By post — Presumptions — Time of receipt — Time of sending — Proof of non-receipt rebuts presumptions — Evidence Act 1995 (Cth), ss 160, 163.

Section 29 of the *Acts Interpretation Act 1901* (Cth) provided relevantly that where an Act authorised any document to be served by post, service was deemed to be effected by properly addressing, prepaying and posting the document as a letter. Section 109X of the *Corporations Act 2001* (Cth) and s 28A of the *Acts Interpretation Act* permitted a document to be served on a company by posting it to the company's registered office.

Section 160 of the *Evidence Act 1995* (Cth) gave rise to a presumption (unless evidence sufficient to raise doubt about the presumption was adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia was received at that address on the fourth working day after having been posted. Section 163 of the *Evidence Act* provided that a letter from a Commonwealth agency addressed to a person at a specified address was presumed (unless evidence sufficient to raise doubt about the presumption was adduced) to have been sent by prepaid post to that address on the fifth business day after the date on which the letter was prepared.

Held: (1) If the address of the registered office of a company as contained in the records of ASIC includes a postcode, the address on an envelope sent to the registered office must include the postcode for the document to be deemed to have been served pursuant to s 29 of the *Acts Interpretation Act*. [24], [27], [28]

(2) Proof of non-receipt of an item sent by post is sufficient to rebut the presumptions to which ss 160 and 163 of the *Evidence Act* give rise. [40]

Muli Muli Local Aboriginal Land Council v Kyogle Shire Council (2004) 132 LGERA 80, followed.

Cases Cited

David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265.

Dwyer v Canon Australia Pty Ltd [2007] SASC 100.

Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87.

Hewitt v Leicester Corporation [1969] 1 WLR 855.

Kyogle Shire Council v Muli Muli Local Aboriginal Land Council (2005) 62 NSWLR 361.

Muli Muli Local Aboriginal Land Council v Kyogle Shire Council (2004) 132 LGERA 80.

Nicholson v Tapp [1972] 1 WLR 1044.

Northumbrian Ice Cream Company Ltd v Breakaway Vending Pty Ltd [2006] NSWSC 1216.

Pearlburst Pty Ltd v Summers Resort Group Pty Ltd [2007] NSWSC 1126.

Perpetual Ltd v Treloar (2009) 14 BPR 27,699.

Prospect County Council v Lethorn [1980] 2 NSWLR 464.

R v County of London Quarter Sessions Appeals Committee; Ex parte Rossi [1956] 1 QB 682.

Renegade Rigging Pty Ltd v Hanlon Nominees Pty Ltd [2010] VSC 385.

Scope Data Systems Pty Ltd v Goman (2007) 70 NSWLR 176.

Sunrise Auto Ltd v Federal Commissioner of Taxation (1995) 61 FCR 446.

SZKGF v Minister for Immigration and Citizenship [2008] FCAFC 84.

SZLBR v Minister for Immigration and Citizenship [2008] FCAFC 85.

SZLBR v Minister for Immigration and Citizenship (2008) 216 FLR 141.

Taxation, Deputy Commissioner of v Clear Blue Developments Pty Ltd (2010) 190 FCR 1.

Taxation, Deputy Commissioner of v Gruber (1998) 43 NSWLR 271.

Taxation, Deputy Commissioner of v Tilley Property Management Services Pty Ltd [2011] FCA 678.

Topfelt Pty Ltd v State Bank of New South Wales Ltd (1993) 47 FCR 226.

Wallville Pty Ltd v Liristis Holdings Pty Ltd (2001) 10 BPR 19,089.

Application

R Schulte, for the applicant.

D Marks, for the respondent.

Cur adv vult

4 April 2012

Logan J.

1 A Deputy Commissioner of Taxation (Commissioner) suing in his official name has applied under s 459P of the *Corporations Act 2001* (Cth) for an order that ABW Design & Construction Pty Ltd ACN 101 130 509 (ABW) be wound up in insolvency under the provisions of that Act.

2 On an application under s 459P, the Court may order that an insolvent company be wound up in insolvency: s 459A of the *Corporations Act*. A company is solvent, if, and only if, it is able to pay all of its debts, as and when they become due and payable; if the company cannot, it is insolvent: s 95A of the *Corporations Act*. For the purposes of an application under s 459P of the *Corporations Act*, s 459C(2)(a) provides that the Court must presume that the company is insolvent if, during or after three months ending on the day on when the application was made, the company failed, as defined by s 459F, to comply with a statutory demand. In this case the failure to comply is grounded upon an alleged failure to comply with the statutory demand within 21 days after it was served on ABW: s 459F(2)(b) of the *Corporations Act*.

3 The Commissioner relies upon this statutory presumption for the purposes of the application to wind up ABW. He has not otherwise led evidence which would prove that ABW is insolvent in the sense described by s 95A of the *Corporations Act*.

4 ABW contends that the statutory demand the non-compliance with which grounds the presumption as to insolvency which the Commissioner calls in aid was not served on it. If the statutory demand was not served, it follows that there can no question of any non-compliance with it. If so, the winding up application must necessarily be dismissed.

5 If, as the Commissioner alleges, service is proved by statutory presumption to have occurred on 22 June 2011, there is no doubt that ABW has not complied with the terms of that demand within the time permitted. If so, ABW makes an alternative submission, which is that, as a matter of discretion in the circumstances, the Court should not order its winding up even if the statutory presumption is engaged such that it is presumed to be insolvent.

6 The threshold question therefore is whether the Commissioner has proved service by post of his statutory demand?

Is there proof of service of the statutory demand?

7 The onus of proving service falls on the Commissioner. The proceeding being civil in character, the standard of proof is proof on the balance of probabilities: s 140 of the *Evidence Act 1995* (Cth). In proving service on ABW the Commissioner seeks to call in aid certain statutory presumptions.

8 Section 109X(1)(a) of the *Corporations Act* permits the serving of a document on a company by, *inter alios*, posting it to the company's registered office. A statutory demand is a document to which s 109X of the *Corporations Act* applies. The Commissioner at least purported to serve his statutory demand on ABW by post.

9 As to what constitutes service by post and related presumptions, the effect of s 5C(2) of the *Corporations Act* is that the *Acts Interpretation Act 1901* (Cth) as in force on 1 January 2005 is applicable.

10 The statutory demand is dated 16 June 2011. It seeks the payment by ABW of an amount of $254,576.65 as more particularly described in the schedule to the notice for the securing or compounding of that amount to the Commissioner's reasonable satisfaction within 21 days after the service of the demand on the company. The debt is constituted by what is known as a "running balance account deficit debt", which is comprised of the balance of various debts owed by ABW to the Commonwealth and payable to the Commissioner under taxation laws after an allowance for any applicable credits.

11 Mrs Sian Kostolanji (Mrs Kostolanji) who is an Australian Public Servant employed in the Townsville office of the Australian Taxation Office gave the following evidence, the whole of which I accept. She stated that on 16 June 2011 she placed the statutory demand as signed by a Deputy Commissioner of Taxation, together with the affidavit accompanying the statutory demand, into an envelope and sealed that envelope. Also that day her evidence establishes that she:

(a) addressed the envelope as follows in her handwriting:

ABW Design & Construction Pty Ltd

Handys Accountants,

Suite 9 Level 1, 1990 Logan Road

Upper Mt Gravatt QLD 4122;

(b) affixed a stamp to the value of 60 cents to the front of the envelope; and

(c) posted the envelope by placing in the Australia Post Mailbox located at the Australia Post Office, Sturt Street, Townsville at 2.09 pm.

12 Mrs Kostolanji made a photocopy of the obverse of the envelope containing the statutory demand and accompanying affidavit as postage stamped and addressed by her prior to posting to the envelope. A good quality copy of that photocopy is annexed to the original of her affidavit. A copy of the reverse side of the envelope is not in evidence but there is no suggestion by either party that it bore anything of significance or, for that matter, anything at all. Regard to the copy of the obverse of the envelope discloses:

(a) the return address on the obverse has been ruled through, although not obliterated so as to make it completely illegible; and

(b) the postcode and, to a lesser extent, the street name (the word "Road") and State (The "d" in "Qld") in the address are each partially obscured by a "private and confidential" stamp.

13 Mrs Kostolanji confirmed in her oral evidence that she had, prior to posting the envelope, crossed through the return address and stamped the envelope "Private and Confidential". Her intention in crossing out the return address was to remove a redundant, pre-printed return address. No alternative return address was specified on the envelope. The combined effect of this act and that omission was to leave the envelope bereft of a return address.

14 The evidence establishes that, at the time of posting, the Mt Gravatt address which Mrs Kostolanji wrote on the envelope was the registered office of ABW. As registered in the records of the Australian Securities and Investments Commission (ASIC), the address of that registered office includes the post code 4122.

15 Given the location of ABW's registered office, it may perhaps be a source of surprise to the reader that the making of the statutory demand was effected by an officer of the Australian Taxation Office stationed in Townsville in North Queensland. That surprise may be tinged with a note of irony by the following.

16 It was common ground in this case, that, amongst the many other offices throughout Australia which the Commissioner maintains, there is an office of the Australian Taxation Office at Logan Road, Upper Mt Gravatt, on the opposite side of that road and about 1 km away from ABW's registered office. Other features at the evidence in this case were that the affidavit in support of the originating process was deposed to by another officer of the Australian Taxation Office, on this occasion stationed at the Commissioner's office at

140 Elizabeth Street, Brisbane. The audit which underpinned the various taxation debts comprising the "running balance account deficit debt" was apparently conducted by an officer of the Australian Taxation Office based in Penrith, New South Wales. The Australian Taxation Office advice (dated 28 October 2010) to ABW of the completion of that audit specified yet another address of the Australian Taxation Office, an address at Albury, New South Wales, as the address to which to request the remission of any interest charge associated with the taxation debts which were raised. A yet further Australian Taxation Office address was specified in that letter as the address to send any objection in respect of the assessments raised. That address was in Sydney, New South Wales. Though it was but a short walk away from ABW's registered office, the Commissioner's Upper Mount Gravatt office appears not to have been assigned any role either in relation to service of the statutory demand, audit or otherwise.

17 The administration of the *Taxation Administration Act 1953* (Cth) is, by s 3A, consigned by Parliament to the Commissioner. There are like provisions in respect of other Federal revenue laws relevant to the underlying taxation liabilities in this matter. There may, perhaps, be good reasons as to why the Australian Taxation Office is presently administered in the manner described, which has resulted in a plethora of different office locations, with the notable exception of the Upper Mount Gravatt office, being concerned with the taxation affairs of ABW. It is neither necessary nor appropriate for a court to explore that subject. Instead, it is necessary to address what is the consequence in the circumstances of this particular case of that present manner of public administration and the use of the post rather than a short walk along and across the road with the statutory demand and supporting affidavit by one of the Commissioner's officers.

18 At the material time, ss 28A and 29 of the *Acts Interpretation Act* respectively provided:

> 28A Service of documents
>
> (1) For the purposes of any Act that requires or permits a document to be served on a person, whether the expression "serve", "give" or "send" or any other expression is used, then [unless the contrary intention appears], the document may be served:
>
> (a) on a natural person:
>
> (i) by delivering it to the person personally; or
>
> (ii) by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or
>
> (b) on a body corporate — by leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate.
>
> (2) Nothing in subsection (1):
>
> (a) affects the operation of any other law of the Commonwealth, or any law of a State or Territory, that authorizes the service of a document otherwise than as provided in that subsection; or
>
> (b) affects the power of a court to authorize service of a document otherwise than as provided in that subsection.
>
> 29 Meaning of service by post
>
> (1) Where an Act authorizes or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any

other expression is used, then [unless the contrary intention appears] the service shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

(2) This section does not affect the operation of section 160 of the *Evidence Act 1995*.

In turn, ss 160 and 163 of the *Evidence Act* respectively provide:

160 Postal articles

(1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted.

(2) This section does not apply if:

(a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) subsection (1) is inconsistent with a term of the contract.

(3) In this section:

"*working day*" means a day that is not:

(a) a Saturday or a Sunday; or

(b) a public holiday or a bank holiday in the place to which the postal article was addressed.

Note: Section 182 gives this section a wider application in relation to postal articles sent by a Commonwealth agency.

163 Proof of letters having been sent by Commonwealth agencies

(1) A letter from a Commonwealth agency addressed to a person at a specified address is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) to have been sent by prepaid post to that address on the fifth business day after the date (if any) that, because of its placement on the letter or otherwise, purports to be the date on which the letter was prepared.

(2) In this section:

"*business day*" means a day that is not:

(a) a Saturday or a Sunday; or

(b) a public holiday or bank holiday in the place in which the letter was prepared.

"*letter*" means any form of written communication that is directed to a particular person or address, and includes:

(a) any standard postal article within the meaning of the *Australian Postal Corporation Act 1989*; and

(b) any envelope, packet, parcel, container or wrapper containing such a communication; and

(c) any unenclosed written communication that is directed to a particular person or address.

Note 1: The NSW Act has no equivalent provision for section 163.

Note 2: Section 5 extends the operation of this section to proceedings in all Australian courts.

It is not necessary to refer either to s 5 or to s 182 of the *Evidence Act* for the purposes of deciding this case.

19 As to s 163 of the *Evidence Act*, a Deputy Commissioner of Taxation is a person who falls within the definition of "Commonwealth agency" for the purposes of that Act in that a Deputy Commissioner is a person holding office or exercising power under or because of a law of the Commonwealth: see s 7 of the *Taxation Administration Act* and the definition in Pt 1 of the Dictionary and s 3 of the *Evidence Act*: *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd* (2010) 190 FCR 1 at [17] (*Deputy Commissioner of Taxation v Clear Blue Developments*). Further, having regard to the broad definition of "letter" in s 163(2) of the *Evidence Act*, a statutory demand is a "letter": *Deputy Commissioner of Taxation v Clear Blue Developments* at [18].

20 As with s 109X of the *Corporations Act*, s 28A of the *Acts Interpretation Act* is facultative. Neither section assists in determining when a document permissibly served by post is to be taken to have been served. That said, even their facultative role with respect to service by post is engaged only if there is compliance with the elements set out in those sections. Those elements were analysed to like effect by Barrett J in *Pearlburst Pty Ltd v Summers Resort Group Pty Ltd* [2007] NSWSC 1126 at [18], by Debelle, J in *Dwyer v Canon Australia Pty Ltd* [2007] SASC 100 at [6] and by Brereton J in *Northumbrian Ice Cream Company Ltd v Breakaway Vending Pty Ltd* [2006] NSWSC 1216 at [12]. Of these elements, it is only necessary to refer to one. That is that the document be posted to the company's registered office.

21 Materially, s 142 of the *Corporations Act* requires a company to have a registered office in "this jurisdiction". The latter is a term defined (s 9 of the *Corporations Act*) by reference to a geographical area which materially comprises the internal territories and each referring State (in the result, all States). The term "registered office" is not separately defined for the purposes of s 28A of the *Acts Interpretation Act* but in context and for an Australian registered body corporate it is necessarily a reference to the registered office of that body corporate under Australian law. For present purposes, that is the same address as that registered for the purposes of s 142 of the *Corporations Act*. Inferentially, from the reference in s 142(3) of the *Corporations Act* to a change of address of a company's registered office, a registered office must be an "address". In respect of a registered office, s 100 of the *Corporations Act* requires that the specification in a notice to ASIC of a company's registered office or change of such office be the "full address, or the full new address, as the case requires, of the relevant office including, where applicable, the number of the room and of the floor or level of the building on which the office is situated". In relation to whether a post code must be included, the presence of the adjective, "full" may be significant, if not determinative but it is unnecessary to decide this. It is enough that, as a matter of construction and having regard to ss 100 and 142 in particular, the *Corporations Act* does not forbid the inclusion of a post code in the address recorded in the register as the registered office of a company.

22 Section 183 of the *Evidence Act* provides:

> Inferences
>
> If a question arises about the application of a provision of this Act in relation to a document or thing, the court may:
>
> (a) examine the document or thing; and
>
> (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.

Note: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

The original of the envelope which contained the statutory demand and supporting affidavit is not in evidence but, as noted above, a good quality copy of its obverse side is. What became of the original is moot, which raises separate issues in relation to proof and date of service. For the moment, all that it is necessary to record is that the description which I have offered above as to what has been obscured by the "private and confidential" stamp placed on the envelope is drawn from my examination of the copy which is in evidence. What is obscured includes the post code.

23 There was quite some debate before me, reflecting, in turn, differences on the authorities, as to whether or not a post code is part of an address. It will be necessary shortly to refer to those authorities. To focus first on them is though apt to distract, at least in the circumstances of this particular case, from the application of the language of s 28A of the *Acts Interpretation Act* and s 109X of the *Corporations Act* to the facts. Whatever may be the case with other corporate registrations, the registered office of ABW includes a post code.

24 In my opinion, the obscuring of the post code by over stamping means that the envelope containing the statutory demand and supporting affidavit has not been sent by the Commissioner by post to the registered office of ABW. That means that the Commissioner has not complied with the terms upon which s 28A of the *Acts Interpretation Act* and s 109X of the *Corporations Act* permit a document such as a statutory demand to be served by post on this particular company. No other manner of service was adopted.

25 In *Topfelt Pty Ltd v State Bank of New South Wales Ltd* (1993) 47 FCR 226 at 231 Lockhart J detailed the history of the introduction of the *Corporate Law Reform Bill 1992* (Cth) which, as enacted, inserted Pt 5.4 into the former *Corporations Law*, now materially replicated in Pt 5.4 of the *Corporations Act*. Regard to that history, confirmed by the presence of s 467A within that part of the *Corporations Act*, discloses that Parliament intended that winding up applications ought not to be dismissed merely because of:

(a) in any case — a defect or irregularity in connection with the application;

(b) in the case of an application for a company to be wound up in insolvency — a defect in a statutory demand.

Similar parliamentary sentiments are evident in s 459J in relation to the setting aside of a statutory demand.

26 Nonetheless, the position remains that, where the terms of s 459F are satisfied on the facts, a presumption of corporate insolvency arises by virtue of s 459C. That can have the serious consequence of establishing a ground for the winding up of a company to say nothing of any wider, commercial consequences. In my opinion, non-compliance with an authorised mode of service is not a "defect *in* a statutory demand" in terms of s 467A. It is a defect with respect to the service of that statutory demand. Nor, in my opinion, is want of proof of service of a statutory demand a defect or irregularity "in connection with" the application. It is a defect or irregularity "in connection with" the service of the statutory demand. Further and in any event, the want of proof of compliance with an authorised mode of service is not a "mere" defect or irregularity. It is critical to procedural fairness in respect of the operation of the statutory presumption of insolvency in the statutory scheme for the winding up of insolvent companies.

The accurate ascertainment of the commencement of the period within which a company is given time to comply with the terms of the statutory demand lest the presumption of insolvency arise is of cardinal importance in that statutory scheme. That period is not one which is capable of extension: *David Grant & Company Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265. To enjoy the benefit of the presumption, an applicant must prove that it is applicable. This the Commissioner has not done.

27 The position is not changed by regard to the first part of s 29 of the *Acts Interpretation Act*. Whatever else "properly addressed" may mean, so far as a corporation is concerned it must mean addressed in a manner authorised by law. That manner is specified in s 28A of the *Acts Interpretation Act* and s 109X of the *Corporations Act*. Section 28A presents a number of postal address options in respect of a body corporate but the only one chosen by the Commissioner was the registered office. The postal option offered by s 109X of the *Corporations Act* is confined to the company's registered office. The balance of s 29 of the *Acts Interpretation Act* is directed to a presumption as to when service is deemed to be effected. The application of that deeming effect is necessarily dependent upon compliance with the authorised manner of postal service. Contrary to a submission made by the Commissioner, the same follows in respect of the presumptions for which ss 160 and 163 of the *Evidence Act* provide.

28 It follows that, for these reasons alone, the winding up application must be dismissed.

29 Lest the foregoing analysis be incorrect and in deference to the submissions of the parties, further consideration of the question of whether service by post has been proved to have been effected even though the post code of the registered office has been obscured is necessary.

30 As was made plain by a helpful and candid submission by Mr Marks of counsel for ABW, the authorities concerning whether or not a post code is to be regarded as part of an address are not all one way. For the purposes of a statutory provision permitting service by post, Bryson J concluded in *Wallville Pty Ltd v Liristis Holdings Pty Ltd* (2001) 10 BPR 19,089 at [19] that that postal context meant that an address included a post code. To the contrary are cases collected and the conclusion reached by Schmidt AJ in *Perpetual Ltd v Treloar* (2009) 14 BPR 27,699 at [20]-[32]. Those cases notably include two judgments of the Full Court, *SZKGF v Minister for Immigration and Citizenship* [2008] FCAFC 84 and *SZLBR v Minister for Immigration and Citizenship* [2008] FCAFC 85 in each of which the conclusion reached by Emmett FM in *SZLBR v Minister for Immigration and Citizenship* (2008) 216 FLR 141 at [39]-[40], which was that a post code was not an essential part of the identification of a physical location, is referred to with approval. Her Honour reached that conclusion by reference to dictionary meanings of the word "address", which defined the word not by any inclusive reference to a post code but rather just as a place where a person lives or may be reached. A like approach to the construction of the word "address" is evident in *Sunrise Auto Ltd v Federal Commissioner of Taxation* (1995) 61 FCR 446 at 455 per Beaumont and Beazley JJ, Drummond J agreeing in this regard, though in that case it was not expressly necessary to consider whether an address included a post code.

31 While in the migration cases the result turned on an absence of practical injustice given that the applicant had in fact received the document concerned, I

consider that I ought nonetheless to follow the clear expressions of approval by the Full Court in those cases for a conclusion that a post code is not an essential part of an address. The statutory context in which those cases were decided does not admit of any material distinction so far as what constitutes an "address" for the purposes of proof of service. Such a conclusion does not carry with it the further conclusion that it is impermissible for a company to include a post code in its registered office as notified to ASIC or for ASIC to include that post code in the register. An "address" may, but not must, include a post code.

32 On this approach, what has occurred here is that the statutory demand and supporting affidavit have been sent by post to ABW's "address", the obscuring of the post code being immaterial. So far as the presumption for which the second part of s 29 of the *Acts Interpretation Act* provides is concerned, the Commissioner has led no evidence as to when the letter containing these documents would have been delivered in the ordinary course of the post to ABW's address at Upper Mount Gravatt if posted on 16 June 2011 from Townsville. Presumably, such evidence would be available from an officer of the Australian Postal Corporation by reference to that corporation's delivery standards and performance against those standards. Such evidence seems to have been led in other postal service cases. It is not a matter of which I can take judicial notice. Instead, the position is as described by White J in *Scope Data Systems Pty Ltd v Goman* (2007) 70 NSWLR 176 at [38]:

> [38] ... If the evidence establishes the time at which the article is delivered to the postal address, then that is the time at which service is taken to be effected. If the evidence does not establish the time at which delivery was effected, then, unless the contrary is proved, delivery is deemed to have been effected in the ordinary course of post. What that is is a question of fact to be proved by evidence. In the absence of evidence on the topic, and in the absence of any presumption, there will be no proof that the article was delivered at a particular time. If it is established that the article was not delivered in the ordinary course of post, but the evidence does not establish when it was delivered, then again there will be no evidence as to the time of delivery. In either case, s 160 of the *Evidence Act* (Cth) (applicable to federal courts), or s 160 of the *Evidence Act* (NSW) (applicable to New South Wales courts), affords a presumption as to when the article is to be taken to have been delivered. The presumption may assist in proving when delivery was made in the ordinary course of post. If the evidence shows that the article was not delivered in the ordinary course of post, the presumption may assist in proof of when the document was delivered.

I referred with approval to this statement in *Deputy Commissioner of Taxation v Clear Blue Developments* at [14], as earlier did Ferguson J in *Renegade Rigging Pty Ltd v Hanlon Nominees Pty Ltd* [2010] VSC 385 at [21].

33 ABW led evidence from Ms Juanita Wilson, an accountant, who is the principal of the accountancy firm Handys Accountants whose office is and was last year at 1990 Logan Road, Upper Mount Gravatt. With the inclusion of the post code 4122, the address of that firm was the registered office of ABW until October 2011. Ms Wilson has practised as an accountant since 1979 and been a member of the Institute of Public Accountants since 2003.

34 Ms Wilson deposed to a system in place at the firm in relation to the collection of mail. Though in her affidavit she deposed to a system as at

30 June 2011, it became plain in the course of her cross-examination that this same system was in place not only in June 2011 but also in May 2011 if not before then.

35 I considered Ms Wilson to be an honest witness doing her best to assist the Court. I accept the whole of her evidence. The system which she described involved the collection of mail each day, usually by one or the other of two support staff in the firm but occasionally by her personally. What then occurred under the system was that the support staff opened and date receipt stamped collected mail and delivered that to the person within the firm responsible for the subject of the correspondence. In the case of ABW, that person was Ms Wilson.

36 Ms Wilson deposed in her affidavit that, since 30 June 2011, the only documents addressed to ABW which had come to her attention via this office system in the firm were a communication from the building services authority and the Commissioner's letter of 10 October 2011 enclosing the winding up application and supporting materials. It also became plain in the course of her oral evidence that the position was no different, so far as the receipt by her of material addressed to ABW was concerned, earlier in June 2011.

37 On the basis of Ms Wilson's evidence, I find that the statutory demand dated 16 June 2011 and accompanying affidavit in the envelope addressed as described were never received at the address, 1990 Logan Road, Upper Mount Gravatt. More particularly, accepting as I do Ms Wilson as an honest witness, I consider it inherently unlikely that an accountant of her experience would not remember the receipt by her of a statutory demand addressed to a client at the firm's address. Further, her evidence was that the accountancy practice was a small one such that the support staff knew most of the clients and the person to whom to allocate the mail with any doubt attending allocation being referred to her. Again, it seems inherently unlikely in such circumstances that Ms Wilson's ignorance of the receipt of the statutory demand is referable to an internal misallocation of received mail.

38 As has been said, proof of non-receipt is not proof of non-delivery: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 96-97; *Deputy Commissioner of Taxation v Gruber* (1998) 43 NSWLR 271 at 277. The Commissioner has called in aid the presumptions for which one or the other or each of ss 160 and 163 of the *Evidence Act* provide. Each of these operates, "unless evidence sufficient to raise doubt about the presumption is adduced". The meaning of this qualification in comparable New South Wales legislation was considered by Cowdroy J, in his Honour's then capacity as a judge of the New South Wales Land and Environment Court, in *Muli Muli Local Aboriginal Land Council v Kyogle Shire Council* (2004) 132 LGERA 80 at [29]:

> [29] No indication is provided by the *Interpretation Act* to suggest that the nature of the "doubt", and the Parliamentary debates leading to the inclusion of s 76(1)(b) in the *Interpretation Act* do not assist. In these circumstances, the Court must draw the inference that the qualification to the presumption could be utilised in instances in which the posted rate notice was never received. This was precisely the circumstances considered by Denning MR in *Hewitt v Leicester Corp* [1969] 1 WLR 855. In that case a statutory presumption was raised by the *Interpretation Act 1889* (UK) which deemed service to be effected when the letter would

have been delivered in the ordinary course of the post. The letter was returned and marked "gone away". Denning MR held that service in such circumstances had not been effected. Denning MR said at 858:

> "We are not bound to 'deem' a notice to be served at a particular time when we know that in fact it was not served at all." The words in s 76(1)(b) of the *Interpretation Act* "unless evidence sufficient to raise doubt is adduced to the contrary" is intended to apply to circumstances such as those prevailing before Denning MR. See also *Regina v County of London Quarter Sessions Appeals Committee; Ex parte Rossi* [1956] 1 QB 682, which confirmed that proof of non-receipt of a document in the ordinary course of post nullified the presumption. For a decision of similar consequence, see *Nicholson v Tapp* [1972] 1 WLR 1044. See also *Prospect County Council v Lethorn and Another* [1980] 2 NSWLR 464 at 469.

39 His Honour's judgment was reversed on other grounds by the Court of Appeal: *Kyogle Shire Council v Muli Muli Local Aboriginal Land Council* (2005) 62 NSWLR 361. However, in so doing and with reference to the qualification "unless evidence sufficient to raise doubt about the presumption is adduced", Tobias JA, with whom Ipp JA and Brownie A-JA agreed stated, at [52]:

> Resolution of this issue requires consideration of whether the statutory presumption may be rebutted by evidence that the letter containing the notice was in fact delivered on 1 August 2003 or whether the relevant doubt is confined to the adducing of evidence with respect to the letter's receipt by its addressee. The primary judge considered that such evidence was confined to the non-receipt of the letter containing the document. In the circumstances, it is unnecessary to resolve finally this issue but my failure to do so should not be construed as necessarily indicating my agreement with the view expressed by his Honour.

40 In the present case, it is likewise unnecessary to decide whether evidence that a document was in fact delivered might permissibly be admitted to rebut the type of presumption for which ss 160 and 163 of the *Evidence Act* provide. No evidence as to when the statutory demand and accompanying affidavit were in fact delivered was led by either party. At the very least and for the reasons given by Cowdroy J, proof of non-receipt would rebut the presumption. Here, there is such proof. Neither s 160 nor s 163 of the *Evidence Act* operates so as to presume the receipt of these documents at a particular time.

41 Proof of non-receipt is also relevant to but not decisive of whether there was non-delivery of the addressed envelope containing these documents. There was evidence that the envelope had not been returned to the Townsville office of the Australian Taxation Office but that is hardly surprising as the only return address on the envelope was struck out. Taking this into account in conjunction with proof of non-receipt and the partial obscuring of the address, I am satisfied on the balance of probabilities that the envelope containing the documents was not even delivered. Further and in any event, there is, as noted, no evidence as to when the envelope as addressed would have been delivered in the ordinary course of the post.

42 It follows that, however one approaches this matter, the Commissioner has not proved non-compliance with the statutory demand within 21 days after it was served on ABW. He has not even proved that it was served.

43 In these circumstances, it is unnecessary to consider whether, if the

Commissioner had proved, by statutory presumption or otherwise, that ABW was insolvent, a winding up order nonetheless ought not to be made as a matter of discretion. I collected the authorities concerned in relation to the exercise of that discretion in *Deputy Commissioner of Taxation v Tilley Property Management Services Pty Ltd* [2011] FCA 678. There was evidence before me, including evidence from ABW's present accountant, Mr Robert Bigalla, as to what would remain if credits as a result of amended business activity statements were applied and objections to underlying assessments were both valid and allowed. On one view, nothing would remain outstanding by ABW but the correctness of that view was controversial in law and in fact, including whether valid objections had been lodged. Given that it is unnecessary to consider the exercise of the discretion, I consider it inappropriate to make and I expressly refrain from making any observation either on the validity of the objections or what might be their prospects of success in the circumstances disclosed. Instead, for the reasons given above, I dismiss the winding up application, with costs.

Orders accordingly

Solicitors for the applicant: *ATO Legal Services*.

Solicitors for the respondent: *Wellners Lawyers*.

DANIEL LORBEER

Appendix C – Examples of court proceedings

Example C.1

The matter is an example of interactions with the ATO where the ATO had appointed an external law firm to be responsible for a winding up application of a debtor.

Facts

Interactions with ATO debt management on this matter occurred between October 2013 and December 2013.

The Taxpayer was an Australia subsidiary of a US publicly listed company. The Australian company had largely ceased operations during the relevant period.

The company's Australian registered office was the company's accountants. Owing to staff changes at the head company, the accountants had difficulties corresponding with the head company and it was not until proceedings were issued that the head company became aware of the tax liability.

Proceedings were issued on 3 October 2013 with the first hearing listed for 8 November 2013.

The Commissioner engaged an external law firm to act in the proceeding.

The member was first contacted by the Taxpayer on 15 October 2013.

The member attempted to contact the Commissioner's solicitors between 18 October 2013 and 24 October 2013 with little success. They were invited to put any proposal for a payment arrangement to the Commissioner's solicitors in writing so that they could take instructions.

The Taxpayer then made a without prejudice offer in writing on 24 October 2013 seeking to enter into a payment arrangement with the Commissioner. The member did not receive a response and wrote to the Commissioner's solicitors again on 1 November 2013, seeking an answer before the hearing on 8 November 2013.

On 5 November 2013, an email from the Commissioner's solicitors was received indicating the hearing could be adjourned but no response to the payment proposal. At this time we also were advised that our client had some outstanding lodgements and, until these were dealt with, the Commissioner would not enter into discussions about a payment arrangement.

The member was required to appear at the first hearing on 8 November 2013 at which time the hearing was adjourned until 6 December 2013.

The Taxpayer made a further offer to enter into a payment arrangement on 4 December 2013, which was refused on 5 December 2013.

As no agreement could be reached, the Taxpayer decided not to oppose the winding up application and was wound up at the hearing on 6 December 2013.

The delay between initially approaching the Commissioner seeking to enter into a payment arrangement and receiving a substantive response to that approach was approximately 50 days. During that time, the Taxpayer incurred significant legal and accountants' fees seeking to enter into a payment arrangement with the Commissioner.

The member found it difficult to enter into any meaningful negotiations with the solicitors acting on behalf of the Commissioner, who needed to seek instructions. This is in contrast to negotiations which take place directly with ATO officers who have the requisite decision making authority.

Concerns

The matter may be an example of:

- The ATO's strategies to manage tax debts, including strategies targeted at reducing the amount and age of total debt (Item 1(a) of your terms of reference).

- The efficiency of the structure and design of the ATO's debt recovery and assistance initiatives – particularly the efficiency of outsourcing debt collection activities to external law firms (Item 2 of your terms of reference).

- The proportionality, consistency and effectiveness of the ATO's debt recovery activities, including its use of creditor statutory demand notices (Item 3(d) of your terms of reference).

- The appropriateness and consistency of assistance that the ATO offers taxpayers including by way of payment arrangements (item 4(a) of your terms of reference).

In this instance, the whole matter was process driven with a view to reducing aged debt, without regard to why the taxpayer had failed to respond to earlier ATO correspondence regarding the debt.

It is more than probable that the ATO would have recovered a higher amount of outstanding tax if it had not sought winding up of the company; but allowed the parent company sufficient time to ensure its subsidiary paid its debts owing to the ATO.

Recommendations

Revised systems

Effective systems need to be put in place to ensure:

- greater efficiency by ensuring taxpayers and their tax agents have the ability to deal with decision makers within the ATO to identify appropriate solutions regarding the repayment of debt; and/or

- lawyers appointed by the ATO to pursue debt recovery proceedings are in a position to meaningfully respond and negotiate alternative arrangements for particular taxpayer circumstances; rather than merely acting as agent for the 'bulk processing' of similar claims.

Example C.2

The matter is an example of a Director Penalty Notice which was issued where the ATO subsequently instituted court recovery proceedings.

Earlier this year, the Deputy Commission of Taxation commenced proceedings in the Queensland District Court in this matter. The defendant's solicitor attempted (on reasonable notice, but without success) to obtain particulars of the claimed unpaid amounts.

Despite court rules, the only contact details on the originating process were a street address (but no person's name); and a "1300" number. The latter connected to a call centre in Parramatta. The number was manned by an operative with no authority to connect the call further, to a lawyer. The operative had a script. The script misrepresented the position under Queensland's Uniform Civil Procedure Rules.

In this example there was no ascertainable ATO officer actually responsible for the carriage of process in a higher court. We are concerned that there should be closer supervision in the issue of such notices, and of any subsequent court recovery.