Revenue Law Journal

Volume 11 | Issue 1 Article 3

January 2001

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Recommended Citation

Anderson, Colin and Morrison, David (2001) "GST and Insolvency Practioner Liability: Who Are You?," *Revenue Law Journal*: Vol. 11: Iss. 1, Article 3.
Available at: http://epublications.bond.edu.au/rlj/vol11/iss1/3

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Abstract
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Keywords
consumption tax, GST, goods and services tax, legislation

Cover Page Footnote
Respectively, Department of Law, Faculty of Business; University of Southern Queensland, Toowoomba and TC Beirne School of Law, The University of Queensland, Brisbane. The title of this paper is borrowed from a 1970 's song written by Peter Townsend. Some 20 years later the drafters of Australian taxation legislation seem to have taken the word ‘you’ to heart.

This journal article is available in Revenue Law Journal: http://epublications.bond.edu.au/rlj/vol11/iss1/3

GST AND INSOLVENCY PRACTITIONER LIABILITY: WHO ARE *YOU*?

By Colin Anderson And David Morrison[1]

Introduction

The imposition of a general consumption tax in Australia from 1 July 2000 has raised interpretation and application issues for many industry groups. One of those groups affected are insolvency practitioners. The legislation, as it operates in relation to them, seems unclear in several respects.

The legislation[2] that details most of the obligations in relation to the payment of the Goods and Services Tax (GST) uses the word 'you' to ascribe the obligations. This article examines how the use of the word 'you', as used in the legislation, affects the position of companies as far as liability for goods and services tax is concerned, when they are under some form of administration because of insolvency[3]. In particular, it suggests that there is considerable doubt as to how the provisions within the goods and services tax legislation might operate where an external party is in control of the company because of insolvency.

The goods and services tax legislation appears to contain a gap as to where liability might fall because it seems to fail to take into account some fundamental aspects of insolvency law, as it relates to companies in these circumstances. The use of the word 'you' in relation to a taxable supply and also in relation to creditable acquisitions, does not make it clear who is being referred to in these circumstances.

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1 Respectively, Department of Law, Faculty of Business; University of Southern Queensland, Toowoomba and TC Beirne School of Law, The University of Queensland, Brisbane. The title of this paper is borrowed from a 1970 's song written by Peter Townsend. Some 20 years later the drafters of Australian taxation legislation seem to have taken the word 'you' to heart.

2 *A New Tax System (Goods and Services Tax) Act 1999*. All references are to this legislation unless otherwise noted.

3 Much of what is said below will also apply to companies that enter into administration for reasons other then insolvency. It seems clear that the goods and services tax legislation does not make any distinction between incapacity because of insolvency and incapacity for any other reason. However, because of the focus on insolvency practitioners and their obligations this article will restrict itself to concentrating on insolvent companies.

The article does not examine any of the many other issues that arise in relation to insolvency practitioners and GST. Some of these have been considered elsewhere.[4] This article concentrates on the very fundamental issue of the position of an insolvency practitioner in respect of the liability for basic transactions that occur during the period of administration. The article commences by describing the current law as it relates to the position of liquidators, receivers and managers, and administrators under a voluntary administration and administrators under a deed of company arrangement in relation to the entity to which they are appointed. It then briefly describes the relevant provisions of the goods and services tax legislation. It analyses these in the light of the earlier explanation of the law and makes some observations about what might be done to clarify the position. It also discusses the potential use of the Corporations Act, in this regard.

The position of the external corporate administrator

Preliminary considerations

Each of the relevant types of administration[5] will be discussed separately below, however note that Chapter 5 of the Corporations Act is titled 'External Administration'. This is significant because, as a matter of statutory interpretation, it implies that the company is continuing in existence and that what is taking place is a change in how the company is to be controlled.[6]

Further, the removal of companies from the ASIC register is dealt with under a separate chapter of the Corporations Act.[7] Thus, under each of the types of administrations dealt with below, for the period of the administration the company remains as a separate entity as it was created under s 119 of the Corporations Act. Consequently, the company has, for the period of its registration, all of legal capacity and powers of an individual.[8]

Position of a Liquidator

4 See D Coombes, *GST and Insolvency: Problems and Solutions and how to Maximize Recoveries,* (paper presented at IPAA Seminar, Brisbane, 23 May 2001); N Thomson, 'The Impact of the New Tax System on Insolvency', 19 *Company and Securities Law Journal*, 84; N Jones, 'Insolvency Practice and GST – Part I', 1 *Australian GST Journal*, 81.

5 The term 'administration' is being used here in the generic sense and not in the sense used in Part 5.3A of the Corporations Act.

6 This can be contrasted with the position of an insolvent individual under the Bankruptcy Act 1966 where property is vested in a trustee: s 58.

7 Namely Chapter 5A titled 'Deregistration of Companies'.

8 Section 124(1) of the *Corporations Act*.

When a winding up commences,[9] a liquidator[10] is appointed to take control of the company in order to carry out the requirements of the legislation. The effect of the commencement of winding up on the company has been described [11]as follows:

> it has no immediate effect upon the corporate personality and powers of the company, and there is not, as there is in bankruptcy, a transfer of the property of the company to the liquidator; but the effect of a company's going into liquidation is to prevent it from carrying on business except for the limited purpose of winding up, and to impose a general prohibition on its power to dispose of property.

Thus the corporate entity remains intact and as a result the type of activities that the company may engage in are restricted. In relation to a voluntary winding up, for example, the effect is described as follows:[12]

> The company shall … cease to carry on its business so far as is in the opinion of the liquidator required for the beneficial disposal or winding up of that business, but the corporate state and corporate powers of the company, notwithstanding anything to the contrary in its constitution, continue until it is deregistered.

The powers of the liquidator in the circumstances are largely set out in s 477 of the Corporations Act. It is stated, for example, that the liquidator of the company '*may carry on the business of the company*'.[13] In this context, it is important to note that the reference is to the company's business. The legislation refers to the liquidator taking '*control*' of property and, as a consequence of this, no legal title to the company's property changes hands. It is possible for property to be vested in the hands of the liquidator,[14] but this is an additional step that requires a court order and is not a usual process.

Essentially, what happens upon the appointment of the liquidator is that the powers of the directors to manage the company cease and those powers are transferred to the liquidator.[15]

The position of the liquidator as against the company is seen as one of agency. Thus, the liquidator is in a position to bind the company in legal transactions.

Specifically, it is well established[16] that:

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9 For the date of commencement see s 513A and s 513B.
10 Or perhaps more then one is appointed.
11 A Keay, *McPherson's Law of Company Liquidation* (4th ed, 1999) 218.
12 Section 493(1).
13 Section 477(1)(a).
14 Section 474(2).
15 Section 471A in a compulsory winding up and s 499(4) in a creditors' voluntary winding up.
16 Keay, above n 11, 332.

> no personal liability attaches to the liquidator in respect of acts and transactions performed or entered into in her or his capacity as agent of the company. Hence, if the liquidator enters into a contract on the company's behalf or appoints a solicitor to assist in the performance of her or his duties, the contract is made with and the liability fixes upon, the company and not the liquidator, since it is to the assets of the company and not to the liquidator personally that credit is given by the other party to the transaction.

This suggests that the liquidator, whilst conducting the business of the company for the purposes of the winding up, is not engaging in transactions in his or her own capacity. The liquidator is undertaking the transactions for the purpose of performing his or her duties under the Corporations Act, but always on behalf of the company.

Position of a Receiver and Manager

A receiver and manager may be appointed by a court or by a lender pursuant to a right that has been agreed upon at the time of providing the funds. This article will restrict itself to dealing with the position of a privately appointed receiver.[17] In respect of a private appointment of a receiver, the appointment is based upon the triggering of a default clause/event pursuant to the lending agreement. The effect on the company is that it remains intact as a separate legal entity. This principle was explained in *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd*[18] as follows:

> Receivership and Management may well dominate exclusively a company's affairs in its dealings and relations with the outside world. But it does not permeate the company's internal domestic structure. That structure continues to exist notwithstanding that the directors no longer have authority to exercise their ordinary business-management functions.

This is quite clear also from the fact that an appointment must be made only to allow control over those assets over which the lender has security. In this sense the company may extend well beyond these particular assets under the receiver's control, depending on the extent of the security. Thus there may well be remaining capacity for directors to undertake some management functions. In addition, whether directors have capacity or not, it is possible that they will be required to act in accordance with their duties under the Corporations Act.[19]

Therefore the company continues in existence separate and distinct from the person who has control over particular assets for the purposes of the receivership.

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17 As with other issues, this is done purely to concentrate on the over-riding issue of the position of the company under insolvency.

18 (1970) 92 WN (NSW) 199 at 209 per Street J. See also J O'Donovan, *Company Receivers and Administrators* (2nd ed, 2000) para [8.20].

19 For example have access to books and records: *Re Geneva Finance Ltd* (1992) 7 ACSR 415.

The position of the appointed receiver is usually that of agent of the company. As Professor O'Donovan explains:[20]

> Privately-appointed receivers and managers are usually expressed to be agents of the company. The receiver's agency has been described as 'special' and 'limited' and 'logically untidy'. By the same token in *O'Callaghan v Custom Credit Corporation Ltd* Anderson J stated that the receiver's agency is real and supported by valuable consideration.

The receiver and manager will therefore at common law not be personally liable in respect of the debts properly incurred in the course of the receivership. This is overridden though by s 419 of the Corporations Act, which makes the receiver liable for debts incurred in the course of the receivership. There is, of course, normally a right of indemnity from the assets of the company and there may also be agreement with the appointor. Where a receiver carries on business of the company, the receiver and manager is not however transacting on his or her own behalf. The transaction is done in the name of the company.

Position of an administrator in a voluntary administration

Under Part 5.3A of the Corporations Act, an administrator may be appointed to a company that is insolvent or likely to become insolvent.[21] The appointment is made for the purpose of enabling a short period of investigation of the company in order that the independent administrator may evaluate the company's prospects. The creditors are then entitled to vote on the future of the company following a report by the administrator. The outcome is either a deed of company arrangement, liquidation or a return of the company to the status quo position before the appointment.

Accordingly, it is fundamental to the voluntary administration that the company remain in existence at this stage as a separate legal entity, albeit as one with a different manager. It is, therefore, paramount to the administration process that the company continues in existence so that any rescue plan that might be proposed would have the possibility of success.

However the appointment is made, the effect is that the administrator has control of the company's business, property and affairs. The administrator can carry on the business and terminate or dispose of the business. In addition the administrator can carry out any of the functions that would otherwise be undertaken by the officers of the company.[22]

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20 O'Donovan, above n 18, para [8.20].
21 Under s 436A 436B or 436C.
22 Section 437A.

Throughout this period, though, the administrator acts as the agent of the company.[23] The powers of the board and other company officers are suspended.[24] Although the administrator acts as agent of the company, the legislation makes him or her personally liable for the debts that are incurred in the course of the administration[25] with a right of indemnity from the assets of the company.[26] Thus the position of the administrator with respect to liability for the debts incurred is somewhat akin to that of a receiver and manager. In the case of an administrator, though, it should be for a relatively short period.

Position of an administrator under deed of company arrangement

Following the appointment of an administrator for the purpose of conducting a voluntary administration, the creditors may decide to place the company under a deed of company arrangement.[27] If that decision is made, then the company enters into a deed of company arrangement with an administrator of the deed appointed to oversee the operation of the deed.[28] Clearly the company in these circumstances continues and indeed that is the very purpose of entering into the deed.[29]

The limitations that arise on entering the deed are in terms of the fact that the company may not act inconsistently with the deed.[30] The effect of the deed will be to release the company from a debt insofar as the release is provided for in the deed and the creditor is bound by it.[31] These are usually[32] those debts that were incurred before the commencement of the voluntary administration. Thus the debts that might be incurred after the entering into a deed are outside the restrictions in the deed itself.[33] The deed therefore has a greater impact on the creditors of the company rather then making any alteration in the position of the company.

The exact position of the administrator of the deed depends very much on the provisions of the deed itself for, although required to contain certain basic provisions,[34] there are no other specific limits on what the deed might contain. There are also certain prescribed

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23 Section 437B.
24 Section 437C.
25 Section 443A.
26 Section 443B.
27 Section 439C.
28 Section 444A.
29 Section 435A.
30 Section 444G.
31 Section 444H.
32 See s 444D and the discussion in *Brash Holdings Ltd v Katile Pty Ltd* (1994) 13 ACSR 504 at 515-516
33 See for example the discussion in *Re Crawford House Press Pty Ltd* (1995) 17 ACSR 295.
34 Section 444A(4).

provisions, which are assumed to be included unless the deed provides otherwise.[35] The result is that there may be a range of possibilities with varying degrees of control over the running of the company. It seems clear, however, that the administrator has a fiduciary relationship with the company and is properly included in the definition of officer in s 9.

This is explained in the table below:

35 Section 444A(5) and *Corporations Regulations Schedule* 8A.

Table 1
Summary of the Position of the External Corporate Administrator
Type of Administration

Effect of Administration	***Liquidation***	***Receivership (Private appointment)***	***Voluntary Administration***	***Deed of Company Arrangement***
Continuity of the Separate Corporate Entity?	Yes	Yes	Yes	Yes
Continuity of Ownership of Property by Company?	Usually	Yes	Yes	Yes
Insolvency appointee agent of the company?	Yes	Yes (although depends on lending documents)	Yes – s 437B	Depends upon terms of the Deed
Insolvency appointee personally liable for debts incurred on behalf of company?	No	Yes – s 419	Yes – s 443A	Depends on terms of the Deed

The GST position

The GST is an indirect broad based tax. The indirect nature of the tax indicates that the burden of the tax does not alter with the income or ability to pay the tax. It is broad-based in the sense that it applies to most transactions at all stages of production rather then being limited to a particular group of transactions. The basic operation of the tax is well known.

For the purposes of this article, the discussion will be limited to some basic rules and provisions about the GST legislation. In particular this article will focus upon the term 'taxable supply' and how that is defined in the legislation. Taxable importations are not discussed. There is no detailed discussion on creditable acquisitions undertaken. Rather this article concentrates on the central provisions establishing liability for GST and how it applies in respect of an insolvent company.

Central provisions

Under s 7-1 of the legislation, GST is payable on taxable supplies.[36] The legislation then goes on to define the term taxable supplies in s 9-5 as follows:

> You make a taxable supply if:
>
> (a) you make the supply for consideration; and
> (b) the supply is made in the course or furtherance of an enterprise that you carry on; and
> (c) the supply is connected with Australia; and
> (d) you are registered, or required to be registered.
>
> However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

Section 9-5 outlines four basic requirements of having a taxable supply. Each of these is required and if any one is missing, a taxable supply will not arise. The logical conclusion is that in the absence of any other provision, where a taxable supply does not arise, there can be no liability for GST from the transaction. The requirement in paragraph (c) will not be discussed further here, nor will the concepts of GST free or input taxed supplies, as they are not relevant. The other three issues do, however, impinge on the position of the insolvent company and the liability for GST.

The first element that s 9-5 requires is that 'you make a supply for consideration'. The term supply is defined very broadly[37] and is likely to encompass most of that which is commonly thought of as a supply. In addition the term 'consideration' is also specifically defined[38] as follows:

> Consideration includes:
>
> (a) any payment, or any act or forbearance, in connection with a supply of anything; and
> (b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.

The focus of the argument here is not so much on what is a supply but on who makes a supply. This is, of course, answered in the legislation by the term 'you'. That term is defined in s 195-1 by declaring that if the expression you is used, it applies to entities generally unless expressly limited. Thus, the term is not meant to be limited to an individual.

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36 And also taxable importations, however these are not covered here.
37 Section 9-10.
38 Section 9-15.

The term entity is itself defined in s 184-1. Thus an entity can include, for example, an individual as well as a body corporate. It also extends to others, such as a trust or a superannuation fund. The note to this definition explains that:

> the term covers all kinds of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does.

This suggests that an entity can be someone other then a legal person. However it refers to 'things that are treated as having a separate identity in the same way as a legal person does'. It seems very unlikely that an insolvency practitioner who is administering a company is ever treated as having a separate identity for the purpose of making a supply. The law as far as companies are concerned shows that, for all relevant administrations, the company remains a separate entity. Thus, when a company enters into a contract or in terms of the Act 'you make a supply', the 'you' being referred to can surely only be the company itself as a separate entity and not those who are its controlling human agents at that particular time.

This view is strengthened by the use of the term 'consideration', which suggests the payment done in connection with the supply. It is also important to recognising that there must be a supply *for* consideration. Thus the ATO has stated;[39] 'there must be a sufficient nexus between the supply and the payment' and the ruling continues,[40]

> The references in the GST Act to 'supply for consideration' and to 'consideration for supply' underscore the close coupling between the supply and the consideration that is necessary before a payment will be consideration for a supply that will make the supply subject to GST.

There is no connection between anything listed in the definition of consideration and those who control the company at the particular time. Thus, it is argued that when a company makes a supply of, say, goods the proper analysis is that the company makes the supply, not those who are acting as the company's agents at a particular time. It is the company that receives the consideration for the supply. Accordingly, the company and not its agents will be liable for GST in respect of that supply, if all other matters are satisfied. This is reinforced when the position of agents generally is considered.

Although Division 153 makes special provisions for certain aspects of agency, there are no specific rules relating to the general situation. Accordingly, it has been accepted that the ordinary law applies. Thus the *Explanatory Memorandum*[41] states that:

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39 GSTR 2001/6 at para 8.

40 GSTR 2001/6 at para 18.

41 *Explanatory Memorandum* to A New Tax System (Goods and Services Tax) Bill 1999 at para 6.277.

> If you make supplies through agents the general law of agency applies. That is, a thing done by your agent as agent for you is a thing done by you. You are liable for the GST on taxable supplies and importations made through your agent. You are entitled to the input tax credits on creditable acquisitions and importations you make through your agent. Your agent is not liable for the GST and is not entitled to the input tax credits.

It is possible for the principal and agent to agree that the general rule above will not apply. This is possible because of Subdivision 153B. This has the effect of treating the transaction as two separate supplies – one from the principal to the agent and a second from the agent to the third party.[42] This is not the usual case, however, and the fact that it apparently requires an agreement in writing[43] would suggest that it is not generally applicable in the insolvency situation.

In order to have a taxable supply, it is also necessary that the supply be made in the course or furtherance of an enterprise that you carry on.[44] Again the issue arises as to what is meant by the term 'you' in relation to carrying on the enterprise. The term enterprise is defined widely to include an activity or series of activities done in the form of a business etc.[45] The general approach in relation to a company structure suggests that, although natural persons carry on the activity, it is the incorporated body that is undertaking the business or the 'you' that is carrying on the enterprise. Thus, for example, the reference in the Corporations Act to the role of the administrator in a voluntary administration is to the 'control of the *company's* business, property and affairs'.[46] The framers of the regulatory regime for GST clearly believed, however, that the appointment of an external administrator resulted in the personal carrying on of an enterprise. It has been claimed therefore[47] that:

> If you are registered and you become bankrupt, or go into receivership or liquidation, the person who conducts your enterprise on your behalf is, generally, personally carrying on the enterprise.

This seems an arguable proposition in relation to companies. The above proposition may be true of a trustee in bankruptcy where divisible property will vest in the trustee.[48] It is

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42 Section 153-50.

43 See s 153-50 which commences with the words 'An entity (the *principal*) may, in writing, enter into an arrangement with another entity (the *agent*) …'.

44 Section 9-5(b).

45 See specifically s 9-20.

46 Section 437A(1) of the Corporations Act. In relation to a liquidator the reference to the power of the liquidator is to the power to carry on the 'business *of the company'* etc: s 477(1)(a) – italics added. See also s 420(2) (h) in relation to a receiver which refers to the power to 'carry on the business of the corporation'.

47 *Explanatory Memorandum*, above n 41, para 6.277.

48 See s 58 of the *Bankruptcy Act 1966*.

not clear why it should be correct in relation to a company, which continues to trade under its own name. To the extent that the company continues to trade, it does so in its own right. The appointment does not alter the corporate personality insofar as the GST legislation is concerned.

To view the situation the way that it is done in the *Explanatory Memorandum* would be to suggest that every time there is a change of directors in a company, there is a different enterprise. The fact that the ATO seems to take a different approach when the company is insolvent to what it does when there are changes in the board of directors creates significant confusion.

The final relevant requirement for a taxable supply in s 9-5 is that 'you' are registered. The requirements for registration are provided for in Division 23 of the legislation. Generally you are required to register if you are carrying on an enterprise and the annual turnover meets the appropriate threshold level.[49] If the annual turnover does not meet the threshold level then a person carrying on an enterprise, may register.[50] For the purposes of this article it is assumed that the companies being discussed were registered prior to the appointment of the insolvency practitioner.

In relation to obtaining input tax credits, the requirements of s 11-20 must be met. Entitlement depends on 'you' making a 'creditable acquisition'. This latter term is itself defined in s 11-5. As with taxable supplies, each of these requires that 'you' undertake a transaction or meet some criteria. It is submitted here that the 'you' being referred to can only make sense, in terms of the general law with respect to companies in an insolvency administration, if it refers to the company and not the insolvency practitioner. Thus the initial requirement is that 'you' must acquire something for a creditable purpose'. It is the company that acquires any good or service ordered by the insolvency practitioner on its behalf.

The notion of a creditable purpose relates back to an acquisition for the carrying on of an enterprise. As argued above, the enterprise being carried on is that of the company not that of the insolvency practitioner. Another requirement is that 'you' provide or are liable to provide consideration for the supply. Again as outlined above, the consideration that is paid moves from the company, not from the insolvency practitioner as such. It may be possible to argue here, though, that the insolvency practitioner is sometimes liable to provide the consideration if the company is not able to do so. This is the effect of provisions in the Corporations Act[51] in relation to receivers and administrators under a voluntary administration. It is suggested that this will only be the case where the company does not meet the primary liability.[52]

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49 Section 23-5.
50 Section 23-10.
51 See s 419 and 443A.
52 It is difficult to see however, how this might alter the insolvency practitioner's position.

The legislation makes special provision for the registration of an insolvency practitioner appointed to an insolvent entity. Division 147 is headed 'Representatives of incapacitated entities'. As noted above, the reference is to *'incapacitated'* entities. The question that arises is whether this is an appropriate description in the case of a company that is in the hands of an external administrator. In fact, to a large extent, under most of the administrations referred to above, the incapacity rests more with creditors of the company than the company itself. The company itself continues in many ways unaffected by the appointment of an administrator, receiver or liquidator. Certainly its operations may be restricted – as in the case of a company in liquidation,[53] but in those transactions that it does undertake, the transaction is with the company.

The specific provisions dealing with 'incapacitated entities' are brief.[54] The most significant of these is that a representative of an incapacitated entity 'is required to be registered' if the incapacitated entity was registered.[55] This is as far as the provision goes, however. It does not deem any supplies to be made by the representative, nor does it deem him or her to be carrying on an enterprise. The definition of a 'representative' and of an 'incapacitated entity' are found in s 195-1.[56] These definitions were amended in 2000 because they initially did not include administrators appointed under Part 5.3A.[57]

A representative is defined both specifically in terms of a liquidator receiver and administrator but also more generally to include:

> A person appointed, or authorised under an Australian law to manage the affairs of an entity because it is unable to pay all its debts as and when they become due and payable.[58]

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53 In that its business may be carried on only for the purpose of winding up the business: s 477.

54 Other provisions including s 162-90 and s 27-40 do not alter the underlying argument here.

55 Section 147-5.

56 It is interesting to note that the definition did not initially include as representatives an administrator under Part 5.3A of the Corporations Act and neither was the incapacitated entity defined to include a company in those circumstances. This had to be overcome after apparently being pointed out to the ATO by the Insolvency Practitioners Association of Australia. The reason for the initial omission is unclear, but it seems that the New Zealand legislation initially included a provision very similar to s 147-5 prior to the amendments: (see s 58 of the Goods and Services Tax Act 1985). It is not surprising that the New Zealand provision did not include any reference to administrators and voluntary administrations because the concepts did not exist under the New Zealand companies legislation. What is surprising is that the Australian provision is similar to that original provision but in New Zealand that section was altered in 1992.

57 See *Taxation Laws Amendment Act (No 8) 2000* – Chapter 6.1.

58 Presumably this is meant to cover persons whose affairs are being managed under Part X of the *Bankruptcy Act 1966*.

It seems that this needs to be read along with the definition of incapacitated entity also in s 195-1. There, the definition is stated to mean not only a bankrupt and an entity in liquidation and receivership, but also an entity that has a representative as defined above.

It is argued here, then, that whilst the definitions of those who have to be registered now covers all forms of insolvency administrations, the fact that registration is required is insufficient for liability in respect of GST. The *Explanatory Memorandum* makes it clear that the intent of Division 147 was to make the insolvency practitioner who is appointed to an insolvent company liable for GST payable during the period of appointment. It states;[59]

> The representative is personally liable for the GST payable and for other requirements of the Bill. The representative is liable from the date on which he or she becomes entitled to act for you (the principal) until he or she ceases to be so entitled. The representative is liable for GST, entitled to input tax credits and has any adjustments attributable to that period.
>
> During that period the effect of ***Division 147*** is that the representative rather than the principal is carrying on the enterprise. The representative is not personally liable for GST attributable before he or she becomes entitled to act for the principal.

Similarly in the Frequently Asked Questions section on the ATO's Tax Reform Website, it states clearly that:[60]

> During the period of appointment, where the representative makes taxable supplies, or creditable acquisitions, the representative is liable for the GST on those supplies, and is entitled to the input tax credits on those acquisitions.

However, despite these clear statements, it is suggested that nowhere does the GST legislation deem the insolvency practitioner to have made the supplies.[61] The legislation only goes so far as to require registration. This has implications for the insolvency practitioner. In particular it is necessary to note s 31-5, which requires a person who is registered to give to the Commissioner a GST return for each tax period. This is so even if there no taxable supplies for that period.[62]

The requirement that the insolvency practitioner be carrying on the enterprise is assumed. It is then accepted that any supply made would also be made by the insolvency

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59 *Explanatory Memorandum*, above n 41, paras 6.272 – 6.273.

60 Located at <http://www.taxreform.ato.gov.au/qa/determinations/dqna/htm>. It should be noted that these are regarded as a ruling for the purposes of s 37 of the *Taxation Administration Act 1953*.

61 Nor the acquisitions in respect of input tax credits.

62 Section 31-5(2).

practitioner. This is an incorrect analysis of the position of the insolvency practitioner in relation to the company. The company continues to carry on any business it carried on prior to the appointment. It is impossible to find in the GST legislation, in Division 147, anything that suggests that this fundamental aspect of the separate entity principle in relation to a company has been overturned. Even if is accepted that the insolvency practitioner carries on the enterprise, it does not seem to follow that he or she makes any supply. They would seem to continue to be made in the name of the company.

Accordingly, it is not possible to agree with the interpretation that the ATO makes as to the effect of Division 147. This issue is likely to create confusion and requires clarification by way of legislative amendment.

There may also be implications in respect of the treatment of any debt arising in relation to the payment of GST, if it is a debt of the company not one of the insolvency practitioner. For example, issues of priority may arise in a liquidation where there are insufficient funds to pay all expenses associated with the winding up that may result in different treatment depending upon the identity of the person determined to be the primary person who incurred the debt.

As noted above, it appears that this part of the legislation has been taken from an earlier version of the New Zealand Goods and Services Tax Act. The Australian provision in relation to the appointment of external administrators may be contrasted with the current wording in the New Zealand legislation. Although the New Zealand legislation initially included a provision[63] somewhat similar to that currently in place in Australia, this was re-written in 1992.[64] As a result the goods and services tax legislation in that country clearly identifies the liquidator and receiver as an 'agent' in relation to incapacitated persons.[65] It then goes on to provide[66] that;

> where any person becomes a specified agent that person shall, during the agency period, be deemed to be a registered person carrying on the taxable activity of the incapacitated person, and the incapacitated person shall during that period be deemed not to be carrying on that taxable activity.

It is suggested that this wording removes the apparent ineffectiveness contained now in the Australian legislation by making clear that the insolvency practitioner is deemed to be carrying on the taxable activity of the entity of which they are appointed agent. This is the step that appears to be missing currently in the Australian provision.

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63 See *Goods and Services Tax Act 1985* (NZ), s 58 as it then was.

64 *Goods and Services Tax Amendment Act (No 2) 1992* (NZ), s 11.

65 The term 'incapacitated persons' is used in the New Zealand provision as well.

66 *Goods and Services Tax Act* (NZ) s 58(1A).

How does the GST system operate where an insolvency practitioner has been appointed if the company makes the supplies?

If, as is argued above, the effect of Division 147 is not as the ATO asserts, then the question arises as to the position of the insolvent company and GST liability. The position that the ATO has taken suggests that the liability for GST is removed from the insolvent company because it is presumably no longer conducting the enterprise. This is reinforced by s 27-40(1)(b) which, for an entity, 'operates to deem its current tax period to have ended at the end of the day before the bankruptcy, receivership or liquidation'.[67] However, if the company continues to operate the enterprise then it seems logical that the company continues to fulfil the conditions required of taxable supplies under s 9-5.

There may be one aspect that remains in doubt. Pursuant to s 9-5(d) there is a requirement that 'you' be registered or required to be registered. Section s 147-5 further requires that the representative be registered on appointment. Does this imply that the company is no longer registered? The position here is unclear. The ATO has issued its guidelines on the basis that the representative is making the supplies etc. Accordingly, it allows the representative, for example, to use during this period the Australian Business Number (ABN) of the insolvent company. If this happens then the legislation relating to matters such as the requirements of tax invoices appears to be met.[68] If this is not the case, and the above argument regarding the making of supplies is correct, then a question arises as to whether any tax invoices issued comply with the requirements of the legislation.[69] If the insolvency practitioner is registered and using the company's ABN, it is not clear whether this implies that the registration of the company is therefore cancelled. There is no specific statement to that effect in the legislation,[70] although the registration must be cancelled if the Commissioner is satisfied that 'you' are not carrying on an enterprise and believes on reasonable grounds that you are not likely to carry on an enterprise for at least 12 months.[71] Again, this raises considerable uncertainty in relation to the above analysis.

Consider the position of a company under a voluntary administration under Part 5.3A of the Corporations Act. By virtue of s 27-40 the tax period would not automatically end because voluntary administration is neither liquidation nor receivership. If the ATO approach were adopted, the registration of the administrator would not of itself imply that the registration of the company be cancelled, because the Commissioner could not be

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67 P Hill, 'Tax Periods: A Critical Analysis', *Australian GST Journal* (November 2001) 123.

68 For example a 'tax invoice' must be issued by the supplier (unless it is a recipient created one) and must set out the ABN of that supplier: s 29-70.

69 That is s 29-70(1) as noted in the previous footnote.

70 There is no specific statement in Division 147 nor anything in Subdivision 25-B which deals with the issue.

71 See s 29-55(2).

satisfied that the company would not be carrying on an enterprise again within the next 12 months.

The result of this analysis suggests therefore that, if the company is fulfilling all of the requirements of s 9-5 rather then the insolvency practitioner, it should remain registered. The implication then is that the company will have primary responsibility for any GST liability. The insolvency practitioner then may still face liability in relation to GST issues through his or her position with the company. This can arise under a number of provisions separate to the GST legislation itself and is dependent somewhat on the nature of the administration being dealt with.

Other potential liability under taxation legislation

Even if the insolvency practitioner is not making any supplies, liability for GST may fall on an insolvency practitioner who is administering a company under the Taxation Administration Act 1953 (Cth). There are specific requirements relating to liquidators and also receivers requiring them to set aside funds under Subdivision 260-B[72] (for a liquidator) and Subdivision 260-C[73] (for a receiver). This obligation is in relation to outstanding tax related liabilities generally[74] and is not limited to GST. It is significant that this obligation does not extend to administrators appointed pursuant to Part 5.3A of the Corporations Act, but only to receivers and liquidators.

This does not, however, create a personal liability in respect of all GST liability for these types of appointments. The personal liability is only to set aside, from the funds available, that portion which relates to the outstanding tax related liabilities. The amount for which liability arises is only that amount up to the date on which the Commissioner gives the notice. Thus it may not include amounts incurred during the administration or it may include amounts incurred before the insolvency practitioner's appointment. Professor O'Donovan has stated[75] in relation to receivers that:

> Receivers of a company that is registered or required to be registered for the purposes of GST are personally liable to pay any GST incurred by the company. Consequently, the receivers are required to lodge GST returns for the company and pay any GST owed by the company.

As argued above, it is suggested that the first of the propositions is doubtful. Authority for the first proposition is not given, but O'Donovan refers to Division 260-B of the

72 These appear in Schedule 1 in the *Taxation Administration Act*: see s 3AA of that Act.
73 Of Schedule 1 in the *Taxation Administration Act*.
74 See s 250-10 for the list of tax-related liabilities.
75 O'Donovan, above n 18, para [11.430].

Taxation Administration Act as limiting the liability to the value of the assets held.[76] In relation to the second sentence, the author refers to s 254 of the Income Tax Assessment Act 1936 (Cth). Why this should provide any authority in relation to GST is unclear, as it appears to limit itself to the Income Tax Assessment Act.[77] The obligation to give to the Commissioner a GST return is found in s 31-5 of the GST legislation, but any liability to directly pay the tax must be found elsewhere.

The position of the insolvency practitioner more generally under this legislation is also somewhat unclear. Section 54 is headed 'Liability of representative of incapacitated entities'. However, on close reading it deals largely with the position where two or more appointments are made. It simply deems those representatives to be jointly and severally liable to pay any amount of indirect tax that would be payable by a representative or makes each liable in respect of any offence in relation to that tax. It thus creates no new liability in this regard.

Somewhat more intriguing is s 57 of the same Act.[78] It may appear to create personal liability for GST for company officers. Although the Taxation Administration Act contains no definition of company officers, all of the external administrators discussed above come under that term in the Corporations Act and would normally also be agents of the company. The section deems the Commissioner to be able to serve or give notices to the company officers or agents if it could be given to or served on the company or its public officer. In addition, any proceeding against the company or its public officer, may be taken against the officer etc by the Commissioner. It then continues to make the representative liable in the same way as the company or public officer would have been. As has been pointed out,[79] in relation to directors' liability under the section:

> In respect of that provision at least - new section 57 of the Taxation Administration Act - that concern seems to be misplaced.

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76 O'Donovan, above n 18, para [11.430] at footnote 1.

77 For example in paragraph (a) the agent 'shall be answerable as taxpayer for doing all such things as are required to be done by virtue of *this Act*' [italics added].

78 The section states:

Liability of directors etc of a company

(1) Any notice, process or proceeding that may be given to, served on or taken against a company or its public officer under an indirect tax law may, if the Commissioner considers it appropriate, be given to, served on, or taken against an entity (the *representative*) who is:
   (a) a director, secretary or other officer of the company; or
   (b) an attorney or agent of the company.

(2) The representative has the same liability in respect of the notice, process or proceeding as the company or public officer would have had if it had been given to, served on or taken against the company or public officer.

(3) This section does not, by implication, reduce any of the obligations or liabilities of the company or public officer.

79 M Murray, *Triple Jeopardy Plus? Directors' Liability for Unpaid Tax* (paper presented to BLEC Insolvency Masterclass, Sydney 27 March 2000).

> That section was considered in a decision in 1984 where it appeared in substantially the same form in s 252 of the ITAA. In *Reynolds v DCT,* the Full Federal Court found that the section was virtually meaningless and did not serve to impose liabilities on directors for unpaid company taxes which had been contended by the Commissioner

The position of the insolvency practitioner is therefore similar to the director in these circumstances. In *Reynolds v DCT*[80] the court made it clear that there was insufficient in the words used[81] to create a liability that would be quite arbitrary in its effect. As Lockhart J pointed out:

> If the construction for which the Commissioner contends is correct, [the section] is indeed far-reaching. It would mean that the Commissioner is empowered to decide whether any and, if so, which, directors or officers (also attorneys or agents) of the company should be prosecuted for an act or default of the company or its public officer. The director of officer selected may in fact have little, if anything, to do with the conduct of the company impugned by the Commissioner.

It remains to be seen if the courts will continue to adopt such an interpretation today. An important issue for an insolvency practitioner is that it raises the possibility of liability for unpaid tax prior to their appointment. This may be the case, if the effect of s 57 is to make an agent liable for the tax payable and does not relate just to liability for ensuring obligations on reporting etc are complied with. This would clearly be an unjust result and possibly not one that the ATO would pursue.

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80 (1984) 3 FCR 329.

81 The wording being discussed was almost identical to that used in s 57. The only difference was that the wording was part of a larger provision rather then being a section on its own. The relevant part read:

> '252(1) Every company carrying on business in Australia, or deriving in Australia income from property, shall at all times, unless exempted by the Commissioner, be represented for the purposes of this Act by a public officer being a person residing in Australia and duly appointed by the company or by its duly authorized agent or attorney. With respect to every such company and public officer the following provisions shall apply:
>
> … (j) Notwithstanding anything contained in this section, and without in anyway limiting, altering or transferring the liability of the public officer of a company, every notice, process or proceeding which under this Act or the regulations thereunder may be given to, served upon or taken against the company or its public officer may, if the Commissioner thinks fit, be given to, served upon or taken against any director, secretary or other officer of the company or any attorney or agent of the company and that director, secretary, officer, attorney or agent shall have the same liability in respect of that notice, process or proceeding as the company or public officer would have had if it had been given to, served upon, or taken against the company or public officer.

One other area of potential concern to the insolvency practitioner in these circumstances is the potential liability for the company's tax obligations under s 8Y of the Taxation Administration Act. This deems any person, who is concerned in, or takes part in, the management of a corporation, to have committed any taxation offence that may have been committed by the corporation subject to certain defences.[82] It does, however, require there to have been an offence committed by the company, so that an insolvency practitioner does not automatically become liable for GST payments because of the section. It would seem that an insolvency practitioner could validly raise the defences in s 8Y(2) in relation to events that occurred prior to his or her appointment.

Liability under the Corporations Act

The liability of an insolvency practitioner for the GST payable by the company might potentially rest on the general provisions in the Corporations Act. As explained above, a liquidator is generally regarded as an agent of the company. Consequently, it seems that there will be no liability, except for that under the general law of agency. There is no statutory provision in the case of a liquidator making him or her liable for the debts of the company that they may incur in the course of the liquidation.

In respect of a receiver and manager not appointed by the court, their position will depend on the documents that form the basis of their appointment. Generally, as explained above, they are privately appointed as agents. In this they would not generally be liable for the debts incurred. However, specific liability attaches to the receiver[83] under s 419. Under that section, the receiver is liable for debts incurred in the course of the receivership for services rendered, goods purchased or property, hired, leased, used or occupied. Section 419 is itself the subject of uncertainty to an extent,[84] however it seems to be consistently interpreted to include only liability on new contracts entered into after appointment, and then only on those items listed specifically in the section. Thus, in the case of a contract which the receiver merely allows to continue there is no personal liability arising under this section.[85] Therefore, under this section a receiver could not be liable in respect of any GST payable on supplies made by the company during the receivership if it were under a continuing contract.

More significantly, the liability under this section refers to situations that are in GST terminology 'acquisitions'. It refers to property hired and goods purchased, for example.

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82 See s 8Y(2). Specifically, these are that the person did not aid, abet, counsel or procure the act or omission and was not in any way directly or indirectly concerned in or party to the act or omission.

83 Special rules apply in respect pre-existing agreements about property used by the corporation: s 419A.

84 See for example O'Donovan, above n 18, para [11.360] and P Blanchard and M Gedye, *The Law of Company Receiverships in Australia and New Zealand* (2nd ed, 1994) para[11.06].

85 *Associated Newspapers Ltd v Grinston* (1949) 66WN (NSW).

These do not give rise to any debt by the company in the GST regime. It seems that the position here from the point of liability for GST is very doubtful.

In respect of an administrator appointed under a voluntary administration pursuant to Part 5.3A, it was explained above that they are agents of the company.[86] In the absence of any provision imposing liability, they would, therefore, generally not be liable for the company's debts. However under s 443A, the administrator is made liable for debts incurred in the performance or exercise of any of his or her functions and powers as administrator for services rendered, goods bought or property that is hired leased used or occupied. This provision is worded somewhat differently to the legislation in respect of the receiver. However, the thrust of it is (again) in respect of acquisitions by the company of goods and services. Thus, as with a receiver, it seems arguable the GST liability does not arise in these circumstances and therefore it will not apply to a GST liability.

Although s 443BA sets out some liability for taxation debts, these do not relate to the GST liability. Further, the legislation specifically provides that the administrator of a company under administration is not liable for the company's debts, except as provided for by Subdivision A of Division 9.[87] This does raise one area of potential conflict, if the argument above in relation to there being no liability under GST legislation is incorrect and the administrator is made personally liable by that legislation. Any argument that the administrator becomes personally liable for the GST debt of the company may conflict with s 443C.

If this is so, what then is the basis of s 443C in terms of its effect? On a policy basis, it may be argued that the administrator ought not be made personally liable in a way that may discourage him or her from continuing the business when this is in fact a major aim of the Part.[88] No doubt the administrator should ensure that the company under his or her control comply with all its obligations under taxation legislation, but making the administrator personally liable for such a debt seems to be taking matters further.

In respect of an administrator under a deed of company arrangement, as outlined above this will depend on the contents of the deed itself. In looking at the prescribed provisions, which will apply unless expressly replaced, the administrator acts as agent. As has been explained;[89]

> The object ... is to protect the deed administrator from personal liability. A company is also deemed to the company's agent, but unlike the deed administrator, the

86 Section 437B.
87 See s 443C.
88 Section 435A.
89 GJ Hamilton, 'Deeds of Company Arrangement: The Prescribed Provisions' (1995) 3 *Insolvency Law Journal* 67, 69.

> company administrator has a statutory personal liability for general trading debts he or she incurs, rental or other amounts payable in respect of the property used or occupied and certain taxation liabilities.

The company administrator does have the automatic right of indemnity under s 443D whereas the deed administrator needs to specifically include this in the deed itself in order to have the right. Thus, it seems strange that, if the analysis above is correct, the position of the deed administrator with respect to GST liability will depend on the provisions in the deed itself.

General duties of external administrators

In addition to the above specific provisions, the external appointee may face liability for failing to cause the company to remit the amount of any GST liability as a result of general duties to conduct the process in the appropriate manner. Thus, in the case of a court appointed liquidator, it has been held[90] that the liquidator is personally liable for a failure to remit group tax deductions under income tax legislation.[91] This was based on s481(2) of the Corporations Act, which requires a liquidator to make good any default, breach of duty, negligence etc prior to release. Santow J analysed the position as follows:

> The failure by Tideturn [the company] to remit to the Commissioner group tax deductions gave rise to a post liquidation debt payable but not provable in the liquidation as a priority payment under s 556(1)(a) Corporations Law. This was an expense properly incurred by a 'relevant authority'(ie the liquidator), in carrying on the company's business, being an amount which the company was required to deduct and remit to the Commissioner from employees' salaries and wages who were employed in the course of carrying on the business…..
>
> If the property of the company is insufficient to meet debts of a class referred to in s 556 (1) Corporations Law, then those debts are to be paid proportionately: see s 559 Corporations Law. Failure to do so, in the event of insufficient funds being available to the liquidator, would be a breach of duty by the liquidator.

On this reasoning, the failure of an external appointee to cause the company to pay GST liabilities could also be seen to be a breach of duty. This is assuming that there is an obligation on the company to remit the amounts.[92] Liquidators under a voluntary liquidation, and receivers and administrators under Part 5.3A are all likely to possess similar duties in this regard. Each has an obligation to manage the company in a manner that would result in the company meeting any of its obligations, including those in the

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90 *DCT v Tideturn Pty Ltd* (2001) 37 ACSR 217.

91 Now under s 12-35 of the *Taxation Administration Act*.

92 This may be in doubt if the company is no longer registered. However as noted above the position in relation to this is unclear, under the present legislation.

area of taxation.[93] Each may be liable for any breach of duty[94] and thus may ultimately bear any responsibility for a failure to comply with the relevant legislation. What is interesting about the potential liability here, though, is that it depends purely on the general or corporate law and does not require any specific provisions in the GST legislation.

Conclusion

The introduction and imposition of the GST has not been smooth in several areas. The position in relation to insolvency of an entity is one of those. This article argues that the basic procedure under which the ATO seeks to deal with insolvent companies is not supported by the legislation. This creates an uncertainty in relation to how the legislation should be given effect to in a practical situation. This article has not attempted to cover some of the more specific transactions in relation to GST and insolvency practitioners, however.

It would seem that there is little basis for ATO assumptions that an insolvency practitioner is fulfilling the requirements in relation to making taxable supplies or for claiming input tax credits when administering a company. Accordingly, it is suggested that the legislation clarify the position. Re-wording Division 147 in line with the wording in the New Zealand legislation could achieve this. In the interim it is likely that confusion will continue.

One of the guiding principles that all taxation regimes should be judged by is certainty. By not clarifying this issue, uncertainty exists. This is in relation to a fundamental matter and one that needs to be considered. It is unfortunate that, so soon after its introduction, significant gaps can be found in the legislation. The legislature has already had to amend the provisions to take account of the types of insolvency administrations that exist in Australia. It is hoped that the argument outlined above will also be a cause for correction by legislative amendment in the future.

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93 This would arise under the ordinary principles, which would indicate that they are all regarded as a fiduciary. See, in relation to administrators under Part 5.3A Austin R P and Brown R Tending to Sick Companies: The Role and Responsibilities of Voluntary Administrators, (paper delivered at Key Developments in Corporate Law and Equity Conference, University Melbourne, 16 March 2001) 14 and in relation to receivers O'Donovan, above n 18, para [11.20] to[11.70].

94 This may be under s 423 in relation to a receiver and s 447E in relation to administrators as well as s 481 as used in the *Tideturn case*.