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Stamp Duty eAlert

Stamp Duty Issues for Liquidators and Receivers

INTRODUCTION

Many practitioners may not think of stamp duty as a particular risk when taking on a liquidation or a receivership and there is limited published guidance on the topic. Against a background of an increasing number of business failures including companies operating in property development it is likely that liquidators and receivers will be faced with stamp duty issues on a more frequent basis. The purpose of this article is to identify some areas where practitioners may encounter stamp duty issues.

PROOF OF TITLE

Unstamped or insufficiently stamped documents forming part of the chain of title to the assets of the company in liquidation or receivership pose practical problems.

Firstly, the liquidator or receiver may have to engage in legal or arbitration proceedings to enforce his rights or to defend against a challenge from a third party. Unstamped or insufficiently stamped documents are not admissible in evidence in civil legal proceedings and the judge or arbitrator may (and in practice occasionally do) object to the admission of an unstamped or insufficiently stamped document. In such cases the normal practice is for the judge or arbitrator to seek an undertaking from the solicitor acting for the party seeking to rely on the document to have the document stamped.

Secondly, a prospective purchaser from a liquidator or receiver is entitled to require that all documents forming a necessary part of the chain of title to a property are properly stamped. It is not permissible for a liquidator or receiver who is selling a property to impose a condition on prospective purchasers precluding them from raising a requisition or objection based on the absence or insufficiency of stamping of a document forming a necessary part of the chain of title to the property. A document which has been adjudicated and bears an adjudication stamp can be relied upon by third parties even if the Revenue subsequently issued a revised assessment against the taxpayer or where a relief was claimed on adjudication if such relief was subsequently clawed back. Accordingly a purchaser's solicitor should not raise objection to a document bearing an adjudication stamp.

Thirdly, if the company to or over which the liquidator or receiver is appointed holds assets which require to be registered in order to perfect title thereto, the relevant registrar may require to be satisfied (and in the case of registered land the registrar is obliged to be satisfied) that the documents are properly stamped and may insist on the documents being presented to the Revenue Commissioners for adjudication for such purpose.

In the above situations a liquidator or receiver although not a party to the relevant document, could find himself in a position of having to pay the stamp duty and interest and penalties for late presentation.

CONSEQUENCES OF APPOINTMENT

The instrument appointing a liquidator or receiver does not itself attract stamp duty although

the debenture pursuant to which he was appointed may have required to be stamped under the Mortgage, Bond, Debenture, Charge head of charge until the abolition of that head of charge which took effect on 7 December 2006.

Of possibly more relevance is the effect on stamp duty reliefs claimed prior to the liquidation or receivership. On the commencement of a liquidation (solvent or insolvent) a company ceases to be beneficial owner of its assets including shares in subsidiaries (Ayerst v C & K (Construction) Ltd [1975] 2 All ER 537). This may affect the following situations:

(a) Relief claimed under section 79 SDCA 1999 on the transfer of assets to the company in liquidation from an associated company within 2 years prior to the commencement of the liquidation is subject to clawback. In such circumstances the duty becomes repayable with interest by the transferee (or if the original transaction was at undervalue by the transferor and transferee).

(b) Relief claimed on pre liquidation transfers from the company in liquidation to an associated company are similarly subject to clawback where they occur within 2 years of the commencement of liquidation. In addition if the transfer was made in contemplation of a liquidation it may fail to comply with section 79(5)(c) SDCA1999 which would deny relief where at the date of the transfer an arrangement exists whereby the 90% qualifying association between the transferor and transferee will be broken at any time thereafter. Or

(c) Transfers effected by the company after the commencement of liquidation even to another company in its group cannot satisfy the conditions of section 79 SDCA1999.

However, it is understood that the Revenue Commissioners may be prepared on a concessionary basis to accept that the qualifying association is not broken where the ownership of the asset remains in the same group of companies. Take by way of example a group consisting of a holding company and two direct subsidiaries thereof and one of those subsidiaries transferred assets to its sister company and within 2 years the transferring company went into liquidation. In technical terms the 90% qualifying association is broken but Revenue would normally be prepared to accept that the relief is not clawed back.

It is sometimes assumed that a transfer of assets effected by a subsidiary company to its parent company in the 2 year period prior to the liquidation of the subsidiary might not be subject to clawback if the transfer was not effected in contemplation of the liquidation. It might be tempting to argue that the parent company is still the legal and beneficial owner of the shares in the subsidiary and that the 90% qualifying association continues to exist on that basis. However this analysis does not stand up to closer scrutiny as the legislation requires that the 90% qualifying association by made up of share capital giving the holder the right to, inter alia, 90% of the profits available for distribution. Once the subsidiary enters liquidation the entitlement of the parent company is to receive any surplus of assets over liabilities and this has been held not to constitute profits (T.J. Wilson (Inspector of Taxes) v Dunnes Stores (Cork) Limited [1982] ILRM 444). However, such a scenario is likely to fall within the parameters within which the Revenue would be prepared to grant the concession outlined above.

The above requirements also mean that a liquidator cannot effect a hivedown of assets to a

clean subsidiary of the company in liquidation in order to be able to sell same to a purchaser.

If a stamp duty liability arose by virtue of such a clawback it is probable that it would not enjoy any particular priority. It is doubtful whether stamp duty comes within the category of "assessed taxes" enjoying priority under section 285(2)(a)(ii) Companies Act 1963. In any case even if stamp duty was considered to be an "assessed tax" priority under Section 285 (2)(a)(ii) will only exist if the existence of the tax liability was either actually notified to the liquidator or was actually known to the liquidator in either case within 6 months of the commencement of the liquidation. It is unlikely that Revenue would have the necessary information available to it in order to make a notification and in a situation involving a potential clawback the level of knowledge of a liquidator of the stamp duty position may not be sufficient to constitute "actual knowledge".

The relief for reconstructions and amalgamations in section 80 SDCA 1999 also contain clawback provisions. Specifically in a share for share swap the acquiring company is required to retain the shares it acquired in the target for 2 years and in a two party share for undertaking swap the target company is required to retain the consideration shares for a period of 2 years. However both of these clawback triggers are helpfully qualified by the words "otherwise than in consequence of a reconstruction, amalgamation or liquidation".

Transactions effected during a liquidation or receivership

It would be unusual for a receiver or liquidator knowingly to be party to a transaction whereby he would incur a stamp duty liability during the course of a liquidation or receivership. Stamp duty is normally the liability of the purchaser/transferee and liquidators and receivers will not commonly be in the position of acquiring assets. However it might be more common for them to be asked to participate in structuring disposals of assets so as to mitigate the purchaser's stamp duty liability. Section 8 SDCA 1999 imposes certain liabilities on the parties to, or anyone "employed or concerned in or about the preparation of", any instrument where the documentation presented to the revenue fraudulently or negligently fails to disclose all the circumstances affecting the liability of the instrument to stamp duty or the quantum of the stamp duty assessable thereon. As it is not possible to obtain an effective indemnity against stamp duty liabilities, liquidators and receivers should exercise caution if asked to co-operate in unusual stamp duty planning arrangements by purchasers.

Distributions in Specie

A distribution of assets in specie by a liquidator to the shareholders of the company is generally not chargeable to ad valorem stamp duty. Once a company enters liquidation it ceases to be the beneficial owner of its assets which are held in trust by the liquidator for the creditors. If the liabilities to the creditors are discharged, the beneficial ownership of any remaining assets vests in the shareholders and a distribution in specie to those shareholders is in effect a transfer of the legal interest only. Accordingly the Revenue Commissioners accept that a distribution in specie is not a conveyance on sale (as there is no sale) nor is it a gift. As the "Conveyance or Transfer of any kind already described in this Schedule" head of charge was abolished by Finance Act 2007 there is no longer a €12.50 fixed duty on distributions in specie. Neither is there any requirement for PD (particulars delivered) stamping where the assets covered by the distribution include land.

However a charge to ad valorem stamp duty may be incurred in the course of a distribution in specie if:

(a) the assets being distributed are the subject of a mortgage or charge and are transferred subject to such mortgage or charge;

(b) the company owes a debt to a third party and the shareholders agree to assume liability for that debt in consideration of the distribution; or

(c) the company owes a debt to the shareholders and the shareholders agree to forgive the debt in consideration of the distribution;

then the instrument of transfer will be chargeable to ad valorem stamp duty under section 41 SDCA 1999 on the amount of the debt owed under the mortgage or the debt assumed or forgiven (as the case may be).

The common form indemnity given to a liquidator against unknown liabilities of the liquidated company should not attract stamp duty. However if a liquidator required an indemnity against specific liabilities of the liquidated company it might attract ad valorem stamp duty.

Court Fees in Official Liduidation

A form of stamp duty is payable on the monies received by a liquidator "in realisation of the assets of the Company" and the current rate is 4% (Supreme Court and High Court Fees Order, 2005: S.I. No. 70 of 2005). It is denoted by way of an impressed stamp on a court fee card. It is in fact a court fee and not technically a stamp duty covered by the Stamp Acts. Where it is payable it must be paid *before* any distribution i.e. before preferential creditors, holders of floating charges, unsecured creditors, members or contributories.

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