

ATO GARNISHEE NOTICES – HOUSE SALE PROCEEDS

Garnishee Orders are a form of enforcement action that can be used for the recovery of debts.

Ordinarily, a court-ordered judgment is required. However, the ATO can issue a garnishee notice in relation to outstanding tax debts without a court judgment being entered.

Pursuant to section 260-5 of the *Taxation Administration Act 1953 (Cth)*, the ATO can issue a statutory garnishee notice against any person or business who owes/holds money for the tax debtor, or may owe/hold money to them in the future.

The ATO may issue a garnishee notice over any sale proceeds arising from the sale of the debtor's real property (house). As the power extends to persons or businesses who owe or hold money for the tax debtor, either now or in the future, this extends to the purchaser of the tax debtor's property, the tax debtor's real estate agent and/or solicitor.

Garnishee notices are powerful recovery tools. In relation to real property, a garnishee notice issued by the ATO may take priority over any existing mortgage or security. A purchaser's obligation pursuant to a garnishee order supersedes the obligation to pay money to a secured creditor in accordance with the tax debtor's instructions. However, this may ultimately mean that the sale would not proceed if the seller is unable to provide the purchaser with clear title to the property.

Although the ATO's ability to issue garnishee notices is an effective and cost-efficient way of obtaining payment of outstanding debts, the ATO takes into account certain considerations in deciding whether a garnishee notice should be issued. The Commissioner of Taxation must have regard to:

- the financial position of the tax debtor and the steps taken to make payment in the shortest possible timeframe having regard to the particular circumstances of the tax debtor;
- the extent of any other debts owed by the debtor;
- whether the revenue is placed at risk because of the actions of the debtor, such as the debtor making payment to other creditors in preference to paying the Commissioner;
- the likely implications of issuing a notice on a debtor's ability to provide for a family or to maintain the viability of a business.

When relating to a property sale, the ATO takes into account individual circumstances and may require that a garnishee notice only apply to that part of the purchase price that is to be paid to the vendor (or as the vendor directs), after the mortgage has been discharged.

Importantly, the ATO's Practice Statement relating to garnishee notices states that the Commissioner will consider any reasonable request from a debtor to either withdraw or vary requirements of a garnishee order, provided the debtor makes suitable alternative arrangements for payment.

If the ATO issues a garnishee notice and the debtor becomes bankrupt, the garnishee notice remains valid and would not normally be withdrawn. However, where it is apparent that a debtor is about to become bankrupt, the Commissioner will only issue a garnishee notice in respect of amounts due (or expected to become due) to the debtor, after having regard to a number of factors. These factors include the need to protect the ATO's revenue and the expected impact that the garnishee will have on the debtor's unrelated, arm's-length creditors, in terms of their likely receipts from the debtor's bankruptcy.

Please contact SRM Lawyers to answer any queries you have relating to garnishee notices or other enforcement action.

Renee Stevens

renees@srmlawyers.com.au