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## GARNISHEE NOTICES

A Garnishee Order is a form of enforcement action that can be used for the recovery of a court-ordered judgment debt. It can be served on a third party who owes monies to the debtor, directing that the third party pay that money to the entity that issued the Garnishee Notice, rather than the debtor.

The ATO can issue a Garnishee Notice under section 260-5 of Schedule 1 to the *Taxation Administration Act (1953)* (Cth), requiring third parties that owe money to a taxpayer, to pay the ATO directly, without the need for a court judgment.

The ATO may serve a Garnishee Notice after it has issued a Director's Penalty Notice. The Garnishee Notice can include outstanding superannuation, penalties and GST.

Unlike the ATO, any other entity that seeks to issue a Garnishee Notice is required to obtain a court judgment in its favour against the debtor, prior to the issue of a Garnishee Notice upon a third party that owes money to the debtor.

If the third party fails to comply with the Garnishee Notice within 14 days of service, an application for judgment can be entered in favour of the party issuing the Garnishee Notice, against that third party directly.

A Garnishee Notice is commonly issued by the ATO in the following circumstances:

- to a tax payer's bank, requiring the bank to pay to the ATO any credit balances in bank accounts held in the name of the tax payer;
- to a tax payer's solicitors or accountants, where monies are held in trust for the tax payer; and
- to a tax payer's debtors.

If the Garnishee Notice is served by the ATO prior to the appointment of an Administrator or Liquidator of a company, or prior to an individual's bankruptcy, it is generally not void against that external administrator / bankruptcy trustee.

Further, a Liquidator is unable to recover the monies received by the Commissioner of Taxation, pursuant to a Garnishee Notice, as an unfair preference payment.

In the bankruptcy of an individual, the Garnishee Notice must be served more than six months before the Court bankruptcy proceedings. The third party debt must arise before the making of the bankruptcy order (unless it relates to salary and wages or income earned after the bankruptcy, which will not vest in the trustee).

The Commissioner of Taxation can issue a Garnishee Notice whenever a taxpayer owes a tax debt. However, the Commissioner can also issue a notice where:

- tax has not yet become due;
- the taxpayer has entered into a repayment arrangement;

- the taxpayer is negotiating with the ATO; or
- the taxpayer has outstanding director's penalty liabilities.

Garnishee Notices can be issued against:

- bank accounts in the debtor's name (the debtor's bank must search for all relevant accounts). Further, if the debtor has an investment account that has not matured, the garnishee notice will remain in place until maturity;
- parties who owe or may later owe the debtor money;
- superannuation funds, although the Garnishee Order will not be effective until the benefit is payable;
- life insurance policies, although the Garnishee Order will not be effective until monies become payable;
- a company in which the debtor hold shares (dividends could be targeted);
- solicitors, for money held in a trust account on the debtor's behalf;
- sale proceeds (Garnishee Notices can take priority over mortgages where the debtor has taken out the mortgage to defeat the Notice);
- a third party, for money paid before the debtor received the Garnishee Notice; and
- employers for wages or salary, being the most common Garnishee Order.

Defences to Garnishee Notices

The ATO should not issue Notices:

- against joint bank accounts (even when both account holders owe a tax debt);
- to the Official Trustee in Bankruptcy;
- if the notice will deprive the debtor of virtually all of his or her income;
- if the debtor's business is being wound up; or
- the debt owed exceeds the 6 year time limitation period.

It is important for directors of companies with outstanding debts owing to the Commissioner of Taxation to determine if the company is solvent ie. in a position to discharge its debts as and when they fall due.

The issue of an ATO Garnishee Notice may take priority over a bank's secured charge over the Company assets. This may in turn lead to the bank issuing demands on the guarantors for repayment of the loan facilities.

Please contact SRM Lawyers to answer any enquiry you have relating to Garnishee Notices.

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