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Are liquidators personally liable for GST?

Deputy Commissioner of Taxation v PM Developments Pty Ltd [2008] FCA 1886 is a recent test case in which a liquidator challenged the ATO's position that liquidators are personally liable for GST from taxable supplies made after the wind up order. Judgment was handed down on 12 December 2008.

Summary of orders made

1. The liquidator is not personally liable to the ATO for GST or any related general interest charge on the sale of the subject property (Lot 8).
2. PM Developments Pty Ltd (in liq) is liable for GST on the sale of Lot 8.
3. The GST on the sale of Lot 8 falls within the category of costs and expenses to be applied in accordance with and under s556(1)(a) of the *Corporation Act*.
4. The Federal Court directed that the GST and other expenses under s556(1)(a) of the *Corporations Act* be paid proportionately by the liquidator (subject to any liens in favour of the solicitors for the liquidator or other creditors under s556(1)(a) of the *Corporations Act*).

Question

5. The liquidator sought a direction from the Federal Court on the question “Is a liquidator of a corporation personally liable for GST in respect of the sale of new residential premises owned by the corporation pursuant to a contract for the sale of those premises entered into and completed after the making of the winding up order?” (“**Question**”)

Facts

6. The ATO wound up PM Developments Pty Ltd (“**the company**”) on 5 July 2007. Mr Greig of Deloitte was appointed the liquidator.
7. The company was the developer of an 8 lot development. Contracts for 7 of the 8 lots had been completed prior to liquidation.

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8. The company was the registered owner of Lot 8. Title to that property has never vested in Mr Greig either in his capacity as liquidator or otherwise. On 27 August 2007, the company entered into a contract for sale of Lot 8 for \$1,755,000 inclusive of GST.
9. In the special conditions, the purchaser acknowledged that the company is in liquidation, and that the liquidator is not personally liable to satisfy any liability under the contract.
10. On settlement, the GST amount was held in the trust account of the solicitors for the company and liquidator.
11. The solicitors corresponded with the ATO regarding the funds. The ATO issued the following private ruling as a result of the application of Division 147 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (“**GST Act**”):

“As the sale of Unit 8 was made by you in your capacity as liquidator of [the company], you (rather than the incapacitated company) are liable for the GST on this supply.”
12. The liquidator then applied for a direction from the Court for an answer to the Question. He was concerned that he may be exposed to litigation for failing to disperse the proceeds of the realisation of the company’s assets in accordance with the requirements of s556 of the *Corporations Act*.
13. The ATO cross-claimed for a declaration that the liquidator was personally liable to the Commonwealth for the GST as well as any general interest charge due for late payment.

Judgment

14. Justice Logan noted that the Question was novel and controversial in academic literature. The ATO wanted this point judicially decided because it took the exceptional step of agreeing to pay the liquidator’s costs in relation to this application, and did not issue an assessment because an assessment is conclusive evidence of that tax liability under the *Taxation Administration Act*, and renders the amount immediately payable.
15. His Honour referred to numerous cases regarding statutory interpretation which support the policy that the intention to impose a tax must be shown by “clear and unambiguous language and cannot be inferred from ambiguous words”, which “requires clarity of language, not inexactitude or indirect references...especially ... where the asserted subjection of a particular person to tax is counter intuitive to what one might expect...”
16. In this case, the company remained the registered proprietor of Lot 8 and under ordinary GST rules, the company was the entity making the supply in selling the lot and therefore, the entity which is liable for GST. The business remained the business of the company (s477(1)(a) *Corporations Act*), and did not become the liquidator’s business upon liquidation. The ATO relied on Division 147 (regarding

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representatives of incapacitated entities) to argue that the liquidator was personally liable for the GST.

17. His Honour noted that Division 147 of the GST Act did not contain any provision which “alerts the reader to the prospect that Div 147 is effecting a fundamental change either to the prevailing general company law position in relation to the absence of personal liability of liquidators for the post liquidation debts of a corporation or, more particularly, to the usual position under the GST Act which is that the person who makes a supply is the one liable to GST.” In summary, there was no express provision to state that the liquidator was personally liable.
18. His Honour contrasted Division 147 to another division of the GST Act regarding principals and agents which expressly and directly imposes liability on someone who has not otherwise made a supply. He then noted that the intention and description in the Explanatory Memorandum is not matched by the language in Division 147, and it is for Parliament to rectify that by further legislation.
19. As the GST Act currently stands, the effect of the liquidator registering with the ATO for GST purposes is that any supplies which the liquidator makes in that “representative” capacity in the event that any property of the corporation is ordered to be vested in him (under s474(2) *Corporations Act*) will become a “taxable supply” by the liquidator. Otherwise, the disposal of the property of the company remains a taxable supply of the corporation and has to be accounted for and paid by the company. (Vesting of property in a liquidator is very rare, and only applies by a Court order (s474(2) *Corporations Act*); in personal bankruptcy, assets vest in the trustee in bankruptcy under the *Bankruptcy Act*.)
20. The GST in this case, being a post liquidation debt of the company, enjoys the payment priority for which s556(1)(a) of the *Corporations Act* provides. It is but one of a number of equal ranking post liquidation debts.
21. As the amount available for distribution was less than the total amount of priority payments to which s556(1)(a) of the *Corporations Act* applies, s559 of the *Corporations Act* required the liquidator to effect proportionate payment.
22. In light of this case, Parliament may amend the GST Act. However, until there are legislative changes, this case is the authority on Division 147 of the GST Act. There may also be an appeal.

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