

# ***IT 2046 - Taxation (Unpaid Company Tax) Act 1982 Freedom Of Information Act 1982 disclosure of information***



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TAXATION RULING NO. IT 2046

TAXATION (UNPAID COMPANY TAX) ACT 1982  
FREEDOM OF INFORMATION ACT 1982  
DISCLOSURE OF INFORMATION

F.O.I. EMBARGO: May be released

REF H.O. REF: J209/110/20 P1 F109 DATE OF EFFECT:

B.O. REF: DATE ORIG. MEMO ISSUED:

F.O.I. INDEX DETAIL

| REFERENCE NO: | SUBJECT REFS:  | LEGISLAT. REFS:   |
|---------------|--|---|
| I 1104767     | T(UCT)<br>FREEDOM OF<br>INFORMATION<br>REQUESTS FOR<br>INFORMATION | T(UCT)AA 4(4)(a)<br>T(UCT)AA 4(5)<br>T(UCT)AA 15<br>T(UCT)AA 18<br>FOIA s.11<br>FOIA s.15 |

PREAMBLE

Section 4(4)(a) of the Taxation (Unpaid Company Tax) Assessment Act provides that the Commissioner can disclose to a person, who is or is likely to be liable for vendors or promoters recoupment tax, information relating to the affairs of another person where that information was or is likely to be taken into account in the assessment of the liability to pay recoupment tax. An obvious example of such information would be the basis of assessment of the relevant target company.

2. Section 4(5) provides that any person who has an existing or potential liability for vendors recoupment tax based on the unpaid ordinary and undistributed profits tax of a particular company may request in writing that the Commissioner disclose all the information in his possession relating to the arrangement or transaction which rendered the company unable to pay its tax. Upon the receipt of such a request, the Commissioner is required by the section to disclose all the relevant information known to him including the identities of the parties to the arrangement or transaction.

3. In addition to the foregoing ss.11 and 15 of the Freedom of Information Act provide vendors and promoters with access to documents, other than exempt documents, where a request is made in writing and the relevant documents are sufficiently described in the request to enable them to be identified.

4. The purpose of this ruling is to provide guidelines in relation to the practical application of ss.4(4)(a) and 4(5) of the Taxation (Unpaid Company Tax) Assessment Act and 11 and 15 of the Freedom of Information Act. The ruling discusses in broad terms the obligations imposed by each of these Acts and specifies the type of information to be provided in relation to companies stripped of pre-tax profits. It also outlines the procedures to be followed by the Recoupment Tax and Freedom of

Information Sections in cases where requests come within the scope of both Acts.

RULING      Section 4(4) (a)

5.            The information which may be disclosed under s.4(4) (a) is information which was or is likely to be taken into account in the assessment of recoupment tax. In other words it refers to the material facts considered in raising such an assessment. These necessarily include matters having a bearing on the amount of tax payable by a particular target company, which forms the basis for a recoupment tax assessment.

6.            Persons who are, or are likely to become, liable to pay recoupment tax can, on request, be supplied with a photocopy of the return as lodged together with an explanation of any adjustments to taxable income made in the raising of the target company's assessment and such further explanations as appear warranted in the particular circumstances of the case.

7.            Many company assessments will be raised on the basis of a profit figure shown in a profit and loss account, appropriation account or balance sheet in the absence of a return. Photocopies of these documents showing the position of the target company as at the date of sale to the promoter can be made available in the course of replying to a request under s.4(4) (a).

8.            Some promoters adopted the practice of preparing "deal sheets" or "summaries" in respect of each pre-tax profit strip organised by them. In relation to requests under s.4(4) (a) enquirers should be informed along the lines that information included in the purchaser's records showed the taxable income of XYZ Pty. Ltd. for the relevant years of income to be \$X. It is not however considered appropriate that enquirers be furnished with photocopies of such deal sheets or summaries, since they often include information which is not relevant to the liability of vendors.

9.            Where the raising of a target company's assessment has required an estimation of the taxable income - as opposed to a taxable income figure disclosed in a return or based on a profit figure shown in a profit and loss account, appropriation account or balance sheet - in the light of *George v FCT* (1952) 86 CLR 183 it is not considered appropriate that replies to requests under s.4(4) (a) include photocopies of documents upon which the estimation is based. Nevertheless, the basis upon which the calculation is made should be advised as this may promote the furnishing of information to place the assessment on a correct footing.

10.           Participation in a tax avoidance scheme would be a matter taken into account in the company assessment even though the view is formed that the scheme does not secure its intended result that no (or less) tax is payable. Accordingly, it is expected that in practice, where a target company has engaged in a tax avoidance scheme persons who are, or are likely to be,

liable for recoupment tax would, in this context, be informed of the participation in such a scheme and of the view that the scheme was ineffective. It is envisaged that information supplied would be sufficiently detailed to acquaint the recipient with the particular type of tax avoidance scheme involved without going into a step by step description of the implementation of that scheme. Where an objection has been lodged by the company, a copy can be made available in the course of replying to a s.4(4) request.

11. The existence of a tax avoidance scheme also necessitates a consideration of the matters contained in ss.3(12) and 5(7) in order to determine whether vendors recoupment tax is likely to become payable. Reference should be made to Taxation Ruling No. IT 2023 which contains guidelines as to the application of those provisions.

12. Experience thus far has shown that requests for disclosure under s.4(4) (a) are most likely to be received after the representative class of former owners of a target company has been informed of the company's tax liability in accordance with either s.15(7), s.18(1) or s.18(5) of the Taxation (Unpaid Company Tax) Assessment Act. In this context the information is being sought to determine whether an objection should be lodged against the company assessment, and if so, what the grounds of objection might be. It may well be that an explanation of how the liability of the company has been calculated will minimize the number of disputed assessments and in many cases promote the early payment of amounts sought to be recovered under the Taxation (Unpaid Company Tax) legislation without the need to raise recoupment tax assessments. In view of the foregoing, every effort should be made to ensure as far as practicable that information requested under s.4(4) (a) is supplied in sufficient time prior to the expiry of the period for objecting against the company assessment to enable vendors to consider their position.

#### Section 4(5)

13. Requests under s.4(5) relate to information known to the Commissioner regarding the arrangement or transaction which had the effect of rendering a company unable to pay its tax.

14. In many cases the precise means by which a target company is stripped of its assets will not be known. It should be noted in this regard that s.4(5) by reference to the information "known to the Commissioner" acknowledges that in some cases there will not be a complete knowledge of the stripping arrangement.

15. The existence of a stripping arrangement or transaction is, by virtue of s.5(1) (h) and s.5(2) (h), a formal element in a former owner of the company being made liable to recoupment tax. Replies to requests under s.4(5) for information relating to, or identifying, the stripping arrangement should canvass those facts which have led the Commissioner to conclude that s.5(1) (h) or s.5(2) (h) applies in relation to the target company and contain a statement that on the basis of those facts it is

considered that such an arrangement exists.

16. The information to be supplied under s.4(5) includes, where available, details of the cashing up of the target company and of the sale of the shares to a known promoter of company stripping schemes. Persons seeking information under s.4(5) could also be advised that the consideration received by the vendor-shareholders is greater than the value of the net assets of the company at the time of sale taking into account the company's existing and contingent tax liabilities. Another matter which, if known, should be disclosed to the enquirer is the existence of distributions made by the stripped company after the relevant sale time. The use of untraceable directors, shareholders and public officers and false or fictitious addresses for service is also considered relevant.

17. Where the target company entered into a tax avoidance scheme after the sale of its shares to the promoter company, the enquirer should be informed of this fact in the terms outlined in paragraph 10 above. Moreover, if there is no evidence indicating that the company entered into such a scheme, the enquirer should be advised accordingly.

18. Finally, persons making a request under s.4(5) should also be advised, where appropriate, that a notice of company assessment issued to the stripped company and that the tax remains unpaid, and that the company has not lodged returns subsequent to the sale of the shares to the promoter.

#### Section 15 and 18 - Service of Companies' Notices of Assessment

19. Sections 15 and 18 provide, inter alia, that where the opinion is formed that recoupment tax is likely to become payable the relevant target company's notice of assessment is to be served on the former owners in accordance with the procedures set out in those sections. The word "likely" in this context should be read as meaning "not certain but a real and not remote chance or possibility". In a situation where it is known that a company with an existing or contingent tax liability has been cashed up and then sold to a promoter of pre-tax profit stripping schemes an opinion can be formed that recoupment tax is likely to become payable and this is sufficient justification for the issue of the company notices of assessment or copies as appropriate.

#### Types of Requests

20. A request made under the Taxation (Unpaid Company Tax) Assessment Act is, for the most part, seeking "information" which may or may not be in existing documentary form and which may be satisfied in the manner of a written reply. By contrast, a request for access under the Freedom of Information Act must be directed to existing documents in the possession of an agency; there is no obligation to construct a document in order to satisfy a reply.

21. The requests lodged to date which include a reference

to both the Taxation (Unpaid Company Tax) Assessment Act and the Freedom of Information Act could be classified into four types, as follows:-

- A - A general request made under the provisions of each Act for full particulars of the basis upon which the company assessments are raised.
- B - One request, incorporating a large number of questions regarding the company's assessments and the former owners' potential liability to recoupment tax. Some of the questions specifically ask for copies of returns and other documents. The request is stated to have been made pursuant to the Taxation (Unpaid Company Tax) Act and the Freedom of Information Act.
- C - A situation similar to 'B' but the request states that if the documents cannot be provided under the Taxation (Unpaid Company Tax) Act they are to be made available pursuant to the Freedom of Information Act.
- D - A separate request pursuant to each Act.

#### Replies

22. The Recoupment Tax Section is to prepare replies to type A, B and C requests and should as far as possible answer any specific questions raised by the enquirers. In preparing the reply, which may include the provision of copies of the documents mentioned in paragraphs 6, 7 and 10 above, the Recoupment Tax Section should consult with the Freedom of Information Section to ensure that there are no other documents that should be provided under the Freedom of Information Act. The reply should acknowledge that the request is made under both the Taxation (Unpaid Company Tax) Assessment Act and the Freedom of Information Act and include a statement to the effect that it is considered that the information and copies of documents provided satisfies the request in full.

23. In relation to type D cases, the Recoupment Tax Section should prepare the reply in relation to requests made under the provisions of the Taxation (Unpaid Company Tax) Assessment Act and refer in the reply to any documents which have been, or are to be, provided separately pursuant to the Freedom of Information Act.

24. The Freedom of Information Section is responsible for the reply to the request made under the Freedom of Information Act in type D cases but should consult with the Recoupment Tax Section regarding the documents that are to be released. In addition, the Freedom of Information Section should obtain copies of type B and C requests. Where a reply to a type B or C request which satisfies the requirements of s.19 of the Freedom of Information Act is unlikely to be processed by the Recoupment Tax Section within 60 days of its receipt, the Freedom of

Information Section should reply to the request for documents.

25. In accordance with usual practice, care should be taken to ensure that disclosures in accordance with either the Taxation (Unpaid Company Tax) Assessment Act or the Freedom of Information Act are made only to those persons contemplated by the legislation and their authorised representatives.

COMMISSIONER OF TAXATION  
9 May 1985