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**DEPUTY COMMISSIONER OF TAXATION (Vic) v AVRAM  
INVESTMENTS PTY LTD - (1992) 9 ACSR 580**

SUPREME COURT OF VICTORIA -- PRACTICE COURT

Harper J

10 September, 18 December 1992

-- Melbourne

**Winding up -- Application -- Scheme of arrangement in place -- Court's discretion to refuse Deputy Commissioner's application -- Balance between prima facie right of petitioning creditor for winding up order and support of remaining creditors for scheme of arrangement -- Interests of majority of creditors to be favoured -- Irrelevance of tax losses available to company.**

The appellant company owed the Deputy Commissioner of Taxation over \$2m. In these proceedings the appellant appealed from an order made on 27 August 1992, pursuant to an application by the Deputy Commissioner, that it be wound up by the court. The appellant argued that the court should exercise its discretion against the application for winding up, as a scheme of arrangement had been drawn up and was approved by the Federal Court, subject to the outcome of this appeal, and its implementation was in the interests of all creditors, including the Deputy Commissioner.

**Held**, allowing the appeal:

(i) In exercising the discretion to accede or dismiss an application to wind up an insolvent company, the court may have regard to the wishes of the company's creditors. It may place those of the petitioning creditor against those of the remaining creditors and ask whether the interests of one outweigh the other, always having regard to the prima facie right of the petitioning creditor in these circumstances to obtain a winding up order.

(ii) Here, the fact that the Deputy Commissioner was the only creditor who wished to proceed with the winding up, whereas the overwhelming majority of creditors voted for the scheme of arrangement, was decisive. For this reason alone, the appeal should be allowed.

(iii) The question of the tax losses available to be used by the company to its advantage were irrelevant to these proceedings.

**Appeal**

This was an appeal from an order of the senior master made on 27 August 1992 that the appellant company be wound up by the court under the Corporations Law.

*S Nyrienda (solicitor)* instructed by *AGS* for the respondent.

*D H Denton* instructed by *Henty Jepson & Kelly* for the applicant.

*J Catalano (solicitor)* instructed by *Masons Solicitors* for the liquidator.

**Harper J.**

This is an appeal from an order of the senior master made on 27 August 1992. The senior master then ordered that the appellant be wound up by the court under the provisions of the Corporations Law Victoria. Mr Allen Horsborough was appointed liquidator.

*9 ACSR 580 at 581*

The senior master also had before him on 27 August a summons filed on behalf of the appellant on 26 August 1992. By that summons the appellant sought an order referring "The Motion", that is, the motion to wind up the appellant, to a judge in the Practice Court and an order pursuant to s 44 of the Corporations (Vic) Act 1990 transferring the proceeding to the Federal Court. This summons was dismissed. It too is the subject of appeal.

In the order effecting that dismissal the following appears:

"The order is made because the court has concluded that the motion should proceed this day and that if any scheme of arrangement as proposed is to be pursued, it is in the interests of the applicant and the creditors he represents that it be implemented, if at all, in the context of a winding up of the company when the liquidator can represent those persons as may be required."

The appeal first came before me on 10 September 1992. Mr Denton of counsel for the company conceded that the company was indebted to the respondent, the Deputy Commissioner of Taxation, in an amount exceeding \$2m. He also conceded that the respondent is entitled *ex debito justitiae* to a winding up order unless the case is one which falls within a limited class, in which the corporation has a discretion to refuse a winding up application.

Mr Denton relied in support of his appeal upon the proposition that I should exercise my discretion against the application here because a scheme of arrangement had been drawn up and was now before the Federal Court; and its implementation was in the interests of all creditors including the respondent.

In judgment delivered on 10 November 1992 his Honour, Heerey J approved the scheme but made orders which, in effect, prevented it being implemented before the outcome of this appeal.

In exercising the court's discretion to accede to or dismiss an application to wind up an insolvent company the court may have regard to the wishes of the company's creditors. It may place those of the petitioning creditor against those of the remaining creditors and ask whether the interests of one outweigh the other, always having regard to the *prima facie* right of the petitioning creditor in these circumstances to obtain a winding up order.

In this case the creditors will receive only a tiny portion of their debts whether the company is wound up or whether the scheme of arrangement is given effect. In these circumstances the fact that the Deputy Commissioner of Taxation is the only creditor who wishes to proceed with the winding up, whereas the overwhelming majority of creditors voted for the scheme of arrangement, is, in my opinion, decisive.

It was put on behalf of the Deputy Commissioner of Taxation that should the company be wound up, the Deputy Commissioner will not be faced in the future with a situation where tax losses that might otherwise be used to its advantage by the company, will be available to the company. Mr Denton submitted, however, that this was an irrelevant

consideration; and in that he was supported, at least to an extent, by Mr Catalano for the liquidator -- to whom I gave leave to appear, the application for leave having been consented to by the parties.

On the basis of the submissions put to me it seems to me that the question of tax losses is, indeed, irrelevant to these proceedings. The legislation provides that in certain circumstances a company may take advantage in the future of losses incurred in the past; and while the legislation does not

*9 ACSR 580 at 582*

specifically preclude a company in the circumstances of the appellant taking advantage of such losses, it seems to me that I ought not to dismiss the appeal simply on the basis that by doing so I will enable the company, should events turn in its favour, to take advantage of the tax losses in question.

For these reasons it seems to me that the primary consideration remains the fact that the overwhelming majority of creditors support the scheme. For this reason and for this reason alone it seems to me that the appeal should be allowed. I will accordingly allow the appeal from the order of the senior master winding up the company. If it is necessary to do so I will allow the appeal from the order of the senior master dismissing the application made by the company pursuant to the summons of 27 August.

### **Orders**

(1) The appeal is allowed in respect both of the application by way of notice of motion filed on 13 August 1991 by the Deputy Commissioner of Taxation and in respect of the summons of the company filed on 26 August 1992.

(2) In respect of the application made by notice of motion, as aforesaid, the orders of the senior master made on 27 August 1992 are set aside and the notice of motion is dismissed.

### **Other matters"**

The court has been informed by counsel for the company that his instructing solicitors have given an undertaking to the liquidator to pay his costs in the sum of \$1000 within 7 days of 18 December 1992 and to do so from the resources of that firm.

There is otherwise no order as to costs on either the notice of motion or the summons.

A P KINNEAR

---- End of Request ----

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